89-376

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HERBERT L. FENSTER
Counsel of Record

RAYMOND B. BIAGINI
CHARLOTTE D. YOUNG

MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

Attorneys for Petitioner
General Dynamics Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that the "approval" element of the government contractor defense requires proof that a government official performed a policy level "substantive review and evaluation" constituting a discretionary act under the Federal Tort Claims Act.

2. Whether the Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that General Dynamics failed to prove the "approval" element of the government contractor defense despite undisputed facts that the government was fully aware of the alleged defects in the product yet chose to use it as designed for thirteen years.

3. Whether the holding by the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) that government approval under the government contractor defense can occur only during the design stage, conflicts with the Fourth Circuit's post-*Boyle* decision in *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989) and the several fededal circuit court decisions prior to *Boyle* that approval can occur after the design stage where the government subsequently discovers the defects yet chooses to use the product as designed.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are:

(1) Gloria Trevino Parker, plaintiff, formerly Gloria Trevino,

(2) Donald and Emily Bloomer,

(3) Maureen Denisha Bond,

(4) Robert and Rose Fitz,

(5) Esther B. Shelton,

(6) the United States of America, and

(7) General Dynamics Corporation.

Pursuant to Sup. Ct. R. 28.1, General Dynamics Corporation has the following parents, subsidiaries (except wholly-owned subsidiaries), and affiliates:

Etudes Techniques et Constructions Aerospatiales, Societe Anonyme

General Dynamics Limited, Mansour-General Dynamics Limited

Ankara Hilton

Perdata Corporation

Tusas Aerospace Industries, Inc.

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No. ———

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GLORIA TREVINO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

General Dynamics Corporation petitions for a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Fifth Circuit affirming the finding by the United States District Court for the Eastern District of Texas that General Dynamics failed to satisfy the "approval" element of the government contractor defense.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the lower court appears at 865 F.2d 1474 (5th Cir. 1989), and is reproduced in the Appendix to this Petition at 1a. The denial by the Fifth Circuit of General Dynamics' Petition for Rehearing *En Banc* and the accompanying dissenting opinion by four Fifth Circuit judges appears at 876 F.2d 1154 (5th Cir. 1989) and also is reproduced in the Appendix at 32a. The opinion of the Eastern District of Texas is published

at 626 F. Supp. 1330 (E.D. 1986) and also is reproduced in the Appendix at 40a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was filed on February 24, 1989. The Fifth Circuit's denial of General Dynamics' Petition for Rehearing *En Banc* was filed June 25, 1989. The judgment was entered on July 6, 1989. General Dynamics seeks a writ of *certiorari* pursuant to the provisions of 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

This case arises out of an accident which occurred on January 16, 1982, in which five Navy divers died within the diving chamber of the U.S.S. GRAYBACK, a Navy submarine. The U.S.S. GRAYBACK had been on maneuvers off the coast of the Philippine Islands when the accident occurred. The five divers had just returned to the submarine after conducting demolition exercises at sea. While the divers were inside the flooded diving chamber of the GRAYBACK, one of the divers, Mr. Bloomer, was supposed to open the ventilation valve to allow air in as he drained the chamber of its water. Mr. Bloomer failed to completely open the ventilation valve. As the water drained from the chamber, a vacuum formed, causing the divers to lose consciousness and drown.

In the early 1960s, the Navy had decided to convert the U.S.S. GRAYBACK from a missile-carrying submarine to one which was capable of allowing divers to exit the submarine to conduct exercises in the open sea and then to re-enter the submarine through a flooded diving chamber. In its 339-page Circular of Requirements, the Navy established the basic design concept for the diving chamber. The Navy then chose one of its own shipyards, Mare Island Naval Shipyard located off the coast of Cali-

fornia, to develop the detailed design for the chamber and actually to build, test and install it into the U.S.S. GRAYBACK.

Because of the Viet Nam war, the Navy experienced manpower shortages in the 1960s. Specifically, Mare Island Naval Shipyard contracted with General Dynamics to borrow hourly draftsmen who were then relocated from Groton, Connecticut, to work literally alongside the Navy design personnel in a large "bull-pen" in the Navy's own facility at Mare Island. Between 1966 and 1968, these personnel supplemented the existing Navy staff and assisted them in generating some of the detailed working drawings for the design of the diving chamber. Each working drawing generated by General Dynamics personnel had on its face a review and approval block which ultimately set forth the signatures of several Navy personnel, including the Navy Assistant Design Superintendent of Mare Island who "approved" the drawing. Appendix at 63a.

After 1968, all General Dynamics personnel left Mare Island and the Navy *alone* continued on its own to generate working drawings for the diving chamber design. In about 1969, the Navy *alone* built the chamber pursuant to the design and installed it into the U.S.S. GRAYBACK. The Navy then conducted sea trials with the newly converted submarine. During these trials, that is, before use, and then thereafter through its own overhaul, maintenance and use of the chamber between 1969 and 1982, the Navy became aware of and was repeatedly alerted to the very characteristics of the chamber at issue, i.e., that the ventilation valve was difficult to open and that it was difficult for a diver to discern whether it was fully open. Nevertheless, the Navy chose not to alter the design but, rather, trained its divers to deal with these various features. Between 1969 and 1982, the Navy used the U.S.S. GRAYBACK diving chamber 555 times without mishap.

The families of the divers first sued the United States under the Federal Tort Claims Act, but the suit was dismissed pursuant to *Feres v. United States*, 340 U.S. 135 (1950). In 1982, the families of the divers sued General Dynamics Corporation in tort for damages and General Dynamics filed a contractual indemnity cross-claim against the United States. In *Trevino v. General Dynamics Corp.*, 626 F. Supp. 1330 (E.D. Tex. 1986), Appendix at 40a, the United States District Court for the Eastern District of Texas concluded *inter alia* that General Dynamics had not proven the government contractor defense because it had not shown that the government had approved reasonably precise specifications for the diving chamber.[1]

The district court assessed that General Dynamics was 80% negligent in the design of the chamber and the Navy was 20% negligent in failing to maintain the chamber and adequately train its divers in its use. The district court noted that because the Navy was immune from tort liability, its finding of Navy negligence was of no consequence. The district court ultimately assessed damages against General Dynamics in the amount of $4.25 million and found that the United States was not liable to General Dynamics on the contractual indemnity claim.

General Dynamics appealed the decision on numerous grounds. Following the Supreme Court's opinion in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), which established the government contractor defense as a matter of federal common law, the United States Court

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[1] This conclusion was directly at odds with the explicit admission of the United States Navy made to the court in its post-trial brief that "the Navy approved the working drawings" (Post-Trial Brief of Defendant/Cross-Defendant United States at 15) (dated Nov. 25, 1985), and that "whatever General Dynamics' degree of participation in the design decisions . . . the basic design for such a chamber was the Navy's." *Id.* at 9.

of Appeals for the Fifth Circuit rendered its opinion in *Trevino* on February 23, 1989. The Fifth Circuit affirmed the lower court's decision, concluding that General Dynamics had not proven the "approval" element of the defense.[2] The Fifth Circuit vacated the lower court's findings regarding the United States' indemnity obligations. On June 26, 1989, the Fifth Circuit denied General Dynamics' Petition for Rehearing *En Banc*, with a vigorous dissent filed by Circuit Judge Jolly and joined by three other judges. 876 F.2d 1154 (5th Cir. 1989); Appendix at 32a.

The Fifth Circuit panel reached the following conclusions which are material to the consideration of the questions presented in this Petition:

> (1) "The U.S.S. GRAYBACK was designed and constructed in the late 1950s as a missile-carrying submarine. . . . In the late 1960s the GRAYBACK was converted to a personnel-carrying submarine capable of dispatching divers underwater." *Trevino v. General Dynamics Corp.*, 865 F.2d at 1476; Appendix at 3a.
>
> (2) "The Navy established the basic design concept for the modifications to the GRAYBACK in a 339-page circular of requirements (COR) describing the design concept . . . [and] selected Mare Island Naval Shipyard (MINS) as the site for the design and conversion work." 865 F.2d at 1476; Appendix at 3a.
>
> (3) "In 1966 and 1967 the Navy contracted with General Dynamics Corporation Electric Boat Division to do the design work on the diving hangar. The contracts required General Dynamics to produce

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[2] This conclusion by the Fifth Circuit was directly contrary to the explicit admission made on the record to the court by the United States Navy that "there is no serious question in this case that the Navy indeed approved the final plans . . ." and that "General Dynamics has met this element of the *Boyle* test." Letter Brief of the United States at 8 (dated Aug. 15, 1988).

working drawings of the hangar . . . ." 865 F.2d at 1476; Appendix at 3a.

(4) "After General Dynamics completed the drawings, the Navy "did undertake to review the working drawings for compliance with the COR." 865 F.2d at 1487 n.14; Appendix at 26a n.14.

(5) "[T]he Navy performed all the manufacturing and conversion work [for the diving chamber] on the GRAYBACK." 865 F.2d at 1477; Appendix at 3a.

(6) "The defective aspects of the design and the dangers of the vacuum were so obvious that the Navy must be charged with knowledge of the defect; yet the Navy built the diving hangar as designed and operated it for thirteen years." 865 F.2d at 1487 n.13; Appendix at 25a n.13.

(7) "The Navy operated the submarine for 13 years without mishap, although Navy personnel noted on at least four occasions that the ventilation valve control was difficult to turn." 865 F.2d at 1477; Appendix at 4a.

(8) "The Navy had control over the product and had every opportunity to exercise discretion over the design. This the Navy did not do." 865 F.2d at 1487 n.13; Appendix at 25a n.13.

(9) The Navy "knew that the system as designed could create a partial vacuum." The Navy "could see that the final design included no safety devices." 865 F.2d at 1487; Appendix at 27a.

(10) "The Navy chose to use the GRAYBACK as designed and dealt with the possibility of a vacuum by training its employees rather than modifying the submarine. Furthermore, the Navy exacerbated the dangers by failing to lubricate the shaft of the valve properly, making it more difficult to turn and more likely that a diver would not realize that it was partially closed." 865 F.2d at 1488-89; Appendix at 29a.

(11) "[T]he Navy's method of dealing with the dangers in the design were effective for thirteen years." 865 F.2d at 1489; Appendix at 29a.

REASONS FOR ALLOWANCE OF THE WRIT

In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), this Court defined the three elements of the government contractor defense:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

108 S. Ct. at 2518. Because the Fifth Circuit in *Trevino* found that General Dynamics met the second and third elements of the defense, 865 F.2d at 1487; Appendix at 26-27a, the sole issue addressed in this Petition is the first, or "approval," element of the defense.

The Fifth Circuit's opinion in *Trevino*, issued not even one year after *Boyle*, essentially dismantles and emasculates the government contractor defense by adopting an unworkable interpretation of *Boyle*'s approval test.[3] In *Boyle*, this Court stated that the approval element is satisfied so long as it is demonstrated that the design feature in question was "considered" not only by the contractor but also by a government official. 108 S. Ct. at 2518. Commenting that "[t]he Supreme Court's use of the terms 'approved' and 'considered' is unfortunate," 865 F.2d at 1481 n.7; Appendix at 13a, the Fifth Circuit proceeded to redefine those terms so as to render this Court's choice of words meaningless.

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[3] Notably, in an opinion dissenting from the Fifth Circuit's denial of General Dynamics' Petition for Rehearing, Circuit Judge Jolly stated that "*Trevino* has effectively rewritten the Supreme Court's test for government contractor immunity given in *Boyle*." 876 F.2d at 1155; Appendix at 34a.

The *Trevino* court's microscopic focus on the word "approval," unwarranted by *Boyle*, begins with the statement that mere government "rubber stamping" of contractor specifications will not suffice, a standard which General Dynamics does not dispute. 865 F.2d at 1485-86; Appendix at 23a-24a. The court proceeded, however, to the other end of the spectrum, holding that if the contractor participates in the design of military equipment, the government's approval" of that design must embody the exercise of a discretionary function under the Federal Tort Claims Act. To show "approval" or "consideration" under *Trevino*, a government contractor must show that the government official performed a "substantive review and evaluation" rising to the level of a policy decision. 865 F.2d at 1486; Appendix at 23a.

By unconditionally importing into the government contractor defense the body of law interpreting the discretionary function exception, *Trevino* introduced into the elements of the defense an entire area of legal analysis clearly not intended by this Court.[4] Under *Trevino*, the government must insert itself into the design process to such an extent that it may as well have generated the design itself.

Moreover, the Fifth Circuit's impossible test for approval reaches far beyond the *Boyle* requirement, placing artificial limits on *when* and *how* government approval can take place. In this respect the *Trevino* decision conflicts directly with the established law in the federal circuits, prior to (and unchanged by) *Boyle*, that "approval" can occur during *or* after the design phase. In contrast, the Fifth Circuit held that approval can only occur during the design phase of the product and then

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[4] Notably, there is currently extraordinary tension among the federal circuits regarding the parameters of the discretionary function exception. *Compare Dube v. Pittsburg-Corning Corp.*, 870 F.2d 790 (1st Cir. 1989) *with Kennewick Irrigation District v. United States*, No. 87-4203 *et al.* (9th Cir. July 12, 1989).

only through an expert evaluation of written design specifications. Under *Trevino*, government approval cannot occur after such time even where, as here—and as the court found—the military itself: (a) actually *builds* the product at issue; (b) *uses* it for 13 years as designed; (c) *knows* of the alleged defect for the entire period of use; and (d) *elects* not to alter the design. *Trevino*'s unwarranted fixation on the design phase completely eclipses this Court's choice of the word "approval."

This approval test also is in direct conflict with a post-*Boyle* decision from the United States Court of Appeals for the Fourth Circuit, which has established that prolonged use of a military product by the government with knowledge of the defect constitutes approval and acceptance of that design. As Circuit Judge Jolly stated similarly in his opinion dissenting from the Fifth Circuit's denial of General Dynamics' Petition for Rehearing:

> [Although the *Boyle* Court chose the word "approve",] the panel in *Trevino* finds that the term "approve" as used in *Boyle* actually means to *establish* reasonably precise specifications, *id.* at 1479; it actually means to "choose" a design feature, *id.* at 1480; it actually means to exercise judgment or policy choice, *id.* at 1484; it actually means to substantively review and evaluate, *id.* at 1487 n.12; in short, it actually means to exercise a discretionary function within the strict meaning of the FTCA. We learn further in *Trevino* that one cannot "approve" a design by full awareness and acceptance of that design, defect and all, for thirteen years, *id.*; and finally, we learn that "approve" is a term that cannot be applied to work done by someone else, *id.* at 1486 ("If the government delegates its design discretion to the contractor and allows the contractor to develop the design, the government contractor defense does not apply . . . .").

876 F.2d at 1155; Appendix at 35a (emphasis in original).

Notably, the Fifth Circuit's *Trevino* opinion directly conflicts with another opinion issued in the *same circuit* on the *same day*. In *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), the Fifth Circuit affirmed the district court's decision entering judgment for the military contractor on the basis of the government contractor defense. In particular, the *Smith* panel adopted pre-*Boyle* case law that approval could occur not only through a review of specifications but also through a review of the product itself. *Id.* at 137-38 (discussing favorably the Fourth Circuit's recognition that approval can occur where the military reviews and approves a mock-up of the equipment). The *Smith* court also found that the lower court properly allowed the defense "in light of the government's acceptance and *extended use*" of the product. *Id.* at 139 (emphasis added). Thus, the *Smith* panel implicitly rejected the narrow *Trevino* approval test by acknowledging that approval can take place in ways other than a substantive, policy-level review of reasonably precise specifications. Even Circuit Judge Jolly, the author of *Smith*, acknowledged that his analysis in *Smith* would "surely have been different" had the *Trevino* approval test been the applicable law at the time. 876 F.2d at 1156; Appendix at 38a.

Not only does *Boyle*'s rationale embrace a broader "approval" test which would cover these subsequent events, but the practical and direct result of *Trevino*'s unduly limited interpretation is to eliminate the protection from tort liability afforded to military contractors and to deter contractors from participating in design efforts. The *Trevino* court's wholesale importation of the discretionary function test into the government contractor defense inexorably will force the courts to second-guess governmental judgments regarding the design of military weaponry, for no contractor could prove that a "substantive" evaluation by the military took place without probing the depth and merit of that evaluation. Because the approval test of the government contractor defense will

be rendered impossible for military contractors to prove under *Trevino*, the *Boyle* decision itself will be rendered a nullity.

Therefore, if the Fifth Circuit's narrow definition of approval is allowed to go unreviewed by this Court, government contractors will not only be subjected to inconsistent legal definitions of approval, but also, at least in the Fifth Circuit, will be essentially denied the protection of the government contractor defense. Moreover, plaintiffs will easily plead around the *Trevino* test and—win or lose—will force the courts at trial to examine in depth military decision-making relating to equipping the armed forces. This Court should grant this Petition to minimize any further multifarious pronouncements from the lower courts and to ensure that their approach to the government contractor defense does not proceed down various inconsistent and illogical paths so soon after *Boyle*.

I. THE FIFTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *BOYLE v. UNITED TECHNOLOGIES CORPORATION* IN ITS APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE GOVERNMENT CONTRACTOR DEFENSE

The *Boyle* Court began its consideration of the government contractor defense with the issue of whether such a defense could exist "in the absence of legislation specifically immunizing Government contractors from liability for design defects." 108 S. Ct. at 2513. Ultimately, this Court concluded that liability for design defects cannot be imposed, as a matter of federal common law, where the three elements of the defense were met. *Id.* at 2518. This Court found the requisite "significant conflict" to justify displacement of state law in the policies underlying the discretionary function exception to the Federal

Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a) (1982). *Id.* at 2517.[5]

In *Boyle*, the discretionary function exception provided a "statutory provision that demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of government procurement." 108 S. Ct. at 2517. The first two elements of the defense, approval and conformance, "assure that the suit is within the area where the policy of the 'discretionary function' exception would be frustrated." *Id.* at 2518. This Court's reliance on the discretionary function exception left unresolved to what extent, if any, the body of law addressing that exception should be imported into the government contractor defense. It does not appear, however, that the *Boyle* decision intended to engraft the entire body of FTCA discretionary function exception law on to the government contractor defense.[6]

A. The *Boyle* Opinion Could Not Have Intended To Require Proof Of A Policy Level Discretionary Function To Satisfy The Approval Element Of The Government Contractor Defense

At the Fifth Circuit, General Dynamics argued that this Court's reliance on the discretionary function exception was intended only to signal the necessary threshold conflict with state law to justify and trigger application of federal common law. The Fifth Circuit disagreed, finding instead that this Court intended essentially to

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[5] Under that exception, the government is exempt from consent to suit for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

[6] The law regarding the discretionary function exception is itself pertubated and in a high state of conflict among the circuits. *See* n.4, *supra*.

replace "approval" with "exercise of discretion." [7] Thus, rather than using the exception as a precondition which "suggests the outlines" of the defense, 108 S. Ct. at 2517, the *Trevino* court held that when the contractor participates in the design of military equipment, the government's approval of that design "*must constitute a discretionary function.*" 865 F.2d at 1480; Appendix at 10a (emphasis added). The Fifth Circuit held: "If the government contractor exercised the actual discretion over the defective feature of the design, then the contractor will not escape liability via the government contractor defense" unless "the government's cognizance of the relevant design features . . . [is] on par with that of the government contractor." 865 F.2d at 1480, 1481 n.7; Appendix at 11a, 13a n.7. The government's approval must "involve the use of policy judgment." 865 F.2d at 1472; Appendix at 10a.

The *Trevino* requirement that governmental "approval" cannot exist without a policy level cognizance by the government of relevant design features "on par with that of the government contractor" will not only overly burden an already arduous design process for military equipment, but will stifle the contractor's creative participation in that process. As such, the defense is stripped of one of its primary objectives: to encourage and protect contractors' participation in the design of military equipment. 108 S. Ct. at 2518. If the contractor can only show approval by showing that the government, not the contractor, made all the design choices, the contractor's participation in the design process becomes meaningless.

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[7] The *Trevino* court noted that *Boyle* "imports into this area of the law . . . a rich case law defining what the government's exercise of discretion is and what it is not." 865 F.2d at 1483; Appendix at 18a.

This Court in *Boyle* could not have intended the first element of the government contractor defense to become so burdened. In his opinion dissenting from the Fifth Circuit's denial of General Dynamics' Petition for Rehearing, Circuit Judge Jolly suggested the role of the discretionary function exception:

> Mr. Justice Scalia specifically explained that government "approval" assures that the design is *within the area* where the discretionary function policy would not be frustrated, because it assures that the design feature in question was *considered* by a government officer and not "*merely* by the contractor itself." *Boyle*, 108 S. Ct. at 2518. This explanation appears immediately after the use of the word "approved" and gives it its meaning. That government involvement be "within the area" does not mean that strict compliance with all of the elements of the discretionary function exception is required. Indeed, the Court indicated that the discretionary function exception only "*suggests* the *outlines* of 'significant conflict' between federal interests and state law in the context of government procurement." 108 S. Ct. at 2517.

876 F.2d at 1156; Appendix at 36a (emphasis in original).[8]

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[8] Since *Boyle*, other lower courts have agreed with the view that this Court's use of the discretionary function exception was only intended to provide a basis for conflict to justify the displacement of state law. None have adopted the "discretionary function" approval test required by *Trevino*. *E.g.*, *Harduvel v. General Dynamics Corp.*, No. 87-3705 (11th Cir. July 31, 1989); *Ramey v. Martin-Baker Aircraft Co.*, 876 F.2d 946 (4th Cir. 1989); *accord Niemann v. General Dynamics Corp.*, No. 85-5528 (S.D. Ill. June 28, 1989) (first prong of *Boyle* test does not require production of evidence that government exercised discretionary judgment), *appeal docketed*, No. 89-2755 (7th Cir 1989).

B. To The Extent Some Proof Of Governmental Discretion Is Required By *Boyle*, The *Trevino* Court Failed To Recognize That It Was Present In This Case

Even if this Court did intend for government contractors to show some exercise of discretion by the government to establish approval, there can be no question but that such discretion *was exercised in this case*. The undisputed facts are: (1) the Navy chose itself, rather than General Dynamics, to build the diving chamber from the design and to install it into the U.S.S. GRAYBACK; (2) the Navy discovered the design features at issue when it tested the chamber before placing it in service; (3) the Navy chose to place the chamber into service knowing of the design characteristics at issue; (4) the Navy continued to note, within the first years of its use, the very features that allegedly caused the accident but nonetheless chose to use the chamber as designed; and (5) the Navy chose to address these design characteristics in the chamber not by redesigning it but by training its personnel around these features. All of these conscious and knowing decisions by the Navy represent elections which are the very essence of approval. Thus, even assuming *Trevino*'s use of the discretionary function test is appropriate, the *Trevino* court erred in its application of that test.

In *Boyle* this Court placed no time limits on *when* discretionary acts constituting approval had to be made or *whether* they could be made only through a review of specifications as opposed, for example, to a review of the product itself. In affirming the district court's finding that General Dynamics failed to meet the approval element of *Boyle*, however, the *Trevino* panel focused solely on whether the Navy had exercised its discretion *during the design phase* by substantively evaluating written specifications. 865 F.2d at 1480; Appendix at 11-12a. The Fifth Circuit completely ignored its own statements

which establish without question that the Navy exercised discretion through a series of decisions at various points in time. As the *Trevino* opinion states:

> (1) "[T]he Navy performed all the manufacturing and conversion work on the GRAYBACK." 865 F.2d at 1477; Appendix at 3a.
>
> (2) "The Navy operated the submarine for 13 years without mishap, although Navy personnel noted on at least four occasions that the ventilation valve control was difficult to turn." 865 F.2d at 1477; Appendix at 4a.
>
> (3) "Because both General Dynamics and the Navy knew that the system as designed could create a partial vacuum, and because both the Navy and General Dynamics could see that the final design included no safety devices, liability of General Dynamics could not be based upon non-disclosure of these dangers." 865 F.2d at 1487; Appendix at 27a.
>
> (4) "The Navy actually did the manufacturing and conversion work. The defective aspects of the design and the dangers of the vacuum were so obvious that the Navy must be charged with knowledge of the defect; yet the Navy built the diving hangar as designed and operated it for thirteen years." 865 F.2d at 1487 n.13; Appendix at 25a n.13.
>
> (5) "The Navy chose to use the GRAYBACK as designed and dealt with the possibility of a vacuum by training its employees rather than by modifying the submarine. . . . [T]he Navy's method of dealing with the dangers in the design were effective for thirteen years." 865 F.2d at 1488-89; Appendix at 29a.
>
> (6) "The Navy had control over the product and had every opportunity to exercise discretion over the design." 865 F.2d at 1487 n.13; Appendix at 25a n.13.

Assuming *arguendo* that an exercise of discretion is necessary under *Boyle*, the *Trevino* court's view of when

and how this exercise must take place cannot be reconciled with case law addressing that exception even in the Fifth Circuit. *E.g.*, *Gordon v. Lykes Brothers Steamship Co.*, 835 F.2d 96 (5th Cir.) (discretion exercised after the injury-causing asbestos was incorporated into the ships on which plaintiff worked), *cert. denied*, 109 S. Ct. 73 (1988). Indeed, the Fifth Circuit's statement that the Navy had control over the product and had "every opportunity to exercise discretion over the design" acknowledges exactly that: discretionary acts constituting approval are not and should not be arbitrarily limited in time. 865 F.2d at 1487 n.13; Appendix at 25a n.13.

Thus, even assuming this Court intended the discretionary function exception to replace the "approval" element of the government contractor defense, General Dynamics provided more than adequate proof that the government exercised its discretion in this case. The *Trevino* court's requirement that the exercise of discretion can only occur during the design stage has no precedential or rational basis.

C. The *Trevino* Court's Discretionary Function Test Necessarily Requires Second-Guessing Of Military Decision-Making And Ultimately Will Result In Higher Costs To The United States

The *Trevino* court's unwarranted requirement that the first element of the government contractor defense must rise to the level of a "substantive review and evaluation of the relevant design features" is flawed for yet another reason: its detrimental impact on military decision-making and increased costs to the United States. 865 F.2d at 1486; Appendix at 23a. When, as *Trevino* requires, the trier of fact "must locate the actual exercise of the discretionary function," 865 F.2d at 1480; Appendix at 11a, and then must find that this exercise of discretion "involve[s] the use of policy judgment," 865 F.2d at 1480; Appendix at 10a, that trier of fact is inevitably forced to do something specifically prohibited by *Boyle*:

"second-guess" the military's "judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." 108 S. Ct. at 2517.[9]

The inquiry that *Trevino* requires in order to "locate the discretion" and determine if it was a "policy level decision" unavoidably leads a court down a slippery slope of delving into military decisions.[10] While the Fifth Circuit advised future triers of fact not to evaluate the "quality" of the government's review, 865 F.2d at 1480-81; Appendix at 11-12a, in fact lower courts will be compelled to do just that. Indeed, in searching for "discretion," even the *Trevino* court itself was drawn into examining the *competence* of the government officials who approved General Dynamics' working drawings. 865 F.2d at 1487 n.12; Appendix at 25a n.12 ("The government's use of *clearly unqualified* individuals to review and approve highly technical design work . . . may be evidence that the government does not intend to exercise design discretion." (emphasis added)).

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[9] As Justice Powell recently stated, writing for the Eleventh Circuit, the judiciary is "the branch of government least competent to review" sensitive military decisions. *Harduvel v. General Dynamics Corp.*, No. 87-3705, slip op. at 3535 (11th Cir. July 31, 1989).

[10] Case law addressing the discretionary function exception confirms this point: Was there—or did there have to be—a "conscious decision" by the military when it approved the defect? *E.g., Kennewick Irrigation District v. United States*, No. 87-4203 *et al.* (9th Cir. July 12, 1989). Was the military acting at an "operational" or "planning level" when it made the choice? *E.g., Myslakowski v. United States*, 806 F.2d 94 (6th Cir. 1986), *cert. denied*, 480 U.S. 948 (1987). Was the military's choice a "traditional government function?" *E.g., Dube v. Pittsburgh-Corning Corp.*, 870 F.2d 790 (1st Cir. 1989). If so, was the choice "susceptible of discretion?" *Id.* As these and other cases show, an extraordinary controversy is rapidly developing among the circuits over the extent to which the government must actually act in order to exercise its "discretion."

In addition to ignoring this Court's admonition against judicial intrusion into military decisions, the *Trevino* court also ignored this Court's stated goal of ensuring that the government does not ultimately bear the burden of these state law tort suits. In *Boyle*, this Court warned that the financial burden of state law tort suits "would ultimately be passed through, substantially if not totally, to the United States itself" if contractors are not protected by the defense. 108 S. Ct. at 2518. The *Trevino* court disagreed: "Actual review and evaluation . . . *does come at a cost* to the government." 865 F.2d at 1480-81 n.5; Appendix at 12a n.5 (emphasis added).

The inevitable second-guessing of military judgments and increased costs to the government resulting from the *Trevino* opinion completely undermines *Boyle*, and, at bottom, starkly reveals the unworkability of importing discretionary function exception case law into the government contractor defense. The difficulty with which the courts have grappled with the parameters of the exception highlights how inappropriate it is as an element of the government contractor defense. The exception does not, as the Fifth Circuit claims, bring a "rich case law" to the government contractor defense. As one court stated, "[r]ather than a seamless web, however, we find the law in this area to be a patchwork quilt." *Blessing v. United States*, 447 F. Supp. 1160, 1167 (E.D. Pa. 1978).

II. THE *TREVINO* COURT'S RIGID DEFINITION OF APPROVAL CREATES A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL

As is discussed above, it appears that the *Boyle* Court never intended the first element of the government contractor defense to be defined by the myriad of case law on the discretionary function exception to the Federal Tort Claims Act. Rather, the reference in *Boyle* to the exception was intended to provide the requisite threshold

conflict for adoption of federal common law. A review of the cases both before and after *Boyle* shows that, with the exception of the Fifth Circuit, the courts below have adopted a simpler, broader approval test which had been established by the majority of the federal circuits prior to *Boyle*.

A. The Fifth Circuit's Limited View Of When And How Approval May Take Place Conflicts With The Law Established By The Federal Circuits Prior To And Unchanged By *Boyle* Regarding Approval

In carefully choosing the words "considered" and "approval" to define the first element of the government contractor defense, this Court in no way suggested that such consideration is limited to a specific point in the design process.[11] The established law in the majority of the federal circuits, unchanged by *Boyle*, recognizes approval in at least four forms:

(1) approval of working drawings or design specifications;[12]

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[11] Although in this Petition General Dynamics argues that "approval" can and did take place *after* the design was complete, General Dynamics in no way admits that approval did not take place *during* the design phase. For example, the Navy, through the Department of Justice, took the position at trial that there was a continuous back and forth discussion between the Navy and General Dynamics during the design stage. In fact, *five* Navy officials at successive levels of seniority formally reviewed and approved the drawings in question, some of which were actually drafted not by General Dynamics personnel but, remarkably enough, by the Navy itself. Thus, essentially the Navy approved its own drawings. Appendix at 63a. Because the Fifth Circuit set forth adequate facts to show that later approval took place, however, General Dynamics has not raised the issue of that earlier approval in this Petition.

[12] *E.g.*, *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989); *Trevino*, 865 F.2d at 1480; *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988).

(2) approval through "back-and-forth" discussions conducted during the design process; [13]

(3) approval through examination and acceptance of a prototype or mock-up; [14] or

(4) approval through extended use of the equipment as produced.[15]

Logically, approval of a design can take place at any point in time prior to the injury at issue; timing is essentially irrelevant. As one court recently stated:

> The Court believes that, contrary to what plaintiff asserts, the relevant time to evaluate the first prong is not limited to the time when the Air Force originally took delivery of the O-2 aircraft. The Air Force's later decisions regarding the equipment may

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[13] *E.g., Harduvel v. General Dynamics Corp.*, No. 87-3705 (11th Cir. July 31, 1989); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985); *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414 (4th Cir. 1986).

[14] *E.g., Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989); *accord In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115, 123 (3d Cir. 1985) (Army inspection and modification of the prototype aircraft "*alone* is sufficient to satisfy the level of government participation in design so as to constitute 'approval' ") (emphasis added), *cert. denied sub nom.* 474 U.S. 1082 (1986); *Boyle v. United Technologies Corp.*, 792 F.2d at 414-15 (approval proven by the Navy's review and approval of a mock-up aircraft); *see also Tillett v. J.I. Case Co.*, 756 F.2d 591, 599 (7th Cir. 1985) (defendant proves approval element of defense solely on the basis of the government's approval of a prototype, i.e., after design and after construction).

[15] *E.g., Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986) (where Army had been using helicopter, knowing of defect, for over twenty years, approval test is "amply established"), *cert. denied*, 108 S. Ct. 2897 (1988); *see also Harduvel v. General Dynamics Corp.*, No. 87-3705, slip op. at 3540 (11th Cir. July 31, 1989) ("[g]overnment review and approval of design and production methods continued after production began"); *Hendrix v. Bell Helicopter Textron, Inc.*, 634 F. Supp. 1551, 1554 (N.D. Tex. 1986) (court finds military approval of the design because all the allegedly defective helicopters are still in operation).

constitute approval of reasonably precise specifications.

Schwindt v. Cessna Aircraft Co., No. CV485-472, mem. op. at 7 (S.D. Ga. Aug. 31, 1988); *see Harduvel v. General Dynamics Corp.*, No. 87-3705, slip. op. at 3542 (11th Cir. July 31, 1989) (government contractor defense proven where Air Force was aware of design defect and "[d]espite its knowledge . . . continued to fly the hundreds of F-16's in operation, and to purchase additional ones").

In finding that General Dynamics failed to show "approval" by the Navy even where the Navy *knew* of the very characteristics at issue in this case, *accepted* the design with such features, *built* the chamber with these characteristics, and *chose* to train around them for thirteen years, the Fifth Circuit set a standard for "approval" which conflicts with federal circuit case law defining the defense. The *Trevino* court's fixation on one particular indicia of approval—approval of working drawings and whether mere "rubber stamping" took place—ignores the other evidence which the courts before and after *Boyle* have uniformly acknowledged demonstrate approval.

The one definition of approval which is no longer viable after *Boyle* is that previously enunciated by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988). The *Shaw* approval test, like the *Trevino* approval test, focused on whether an *informed* government approval occurred *during* the design phase.[16] Both *Trevino* and *Shaw*

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[16] The *Shaw* test required a showing that: "(1) the contractor did not participate, or only participated minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor *to proceed with the dangerous* design." *Boyle*, 108 S. Ct. at 2518 (emphasis supplied).

require a court to compare the nature and level of contractor and government participation during the design stage. This Court rejected *Shaw*, however, holding that "[w]hile this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the Federal interest embodied in the 'discretionary function' exemption." *Boyle*, 108 S. Ct. at 2518.

It is clear that the *Trevino* result—no approval even in the face of full acceptance with knowledge—cannot coexist with *Boyle* or other case law. As Circuit Judge Jolly stated in his dissenting opinion:

> I agree with the panel that "approve" is not synonymous with "rubber stamp." It does seem to me, however, that when the government furnishes 339 pages of specifications and involves a review team with the plans, "rubber stamp" is not an apt description of the government's involvement. Generally speaking, I would think that in this case if the government *considered* the plans and affirmatively assented to them, it has "approved"; or if the government, in the panel's words, was "charged with the knowledge of the defect" and accepted the design, especially for a period of years with no complaint, it has "approved" contract specifications within the meaning of *Boyle*.

876 F.2d 1156; Appendix at 36a.

B. The Fifth Circuit's Limited View Of When And How Approval May Take Place Conflicts With The Fourth Circuit's Post-*Boyle* Interpretation Of Approval

In addition to conflicting with the broad approval test outlined by the case law prior to *Boyle* and adopted by this Court in *Boyle*, the *Trevino* court's narrow definition of when and how approval can take place conflicts with the Fourth Circuit's interpretation of *Boyle*. In *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989), the Fourth Circuit considered the government

contractor defense, explicitly holding that the approval element of *Boyle* may be established in two ways: (1) proof that the government's review of the specifications was more than a rubber stamp; *or* (2) a showing that the military continued using the product, even though it knew of its defective feature. *Ramey*'s adoption of the traditional broad approval test cannot be reconciled with *Trevino*'s narrow test.

In *Ramey*, the plaintiff was injured while trying to remove an ejection seat from the cockpit of a Navy F-18 fighter aircraft. Martin-Baker Aircraft Company manufactured the ejection seat as a subcontractor to McDonnell Douglas, the designer and producer of the F-18. Defendant Martin-Baker asserted that it was immune from liability based on the government contractor defense, and the district court agreed. *Ramey v. Martin-Baker Aircraft Co.*, 656 F. Supp. 984 (D. Md. 1987), *aff'd*, 874 F.2d 946 (4th Cir. 1989).

On appeal, the Fourth Circuit applied the defense as adopted by this Court in *Boyle*, affirming that the contractor had proven the three elements. With respect to the approval element of *Boyle*, the Fourth Circuit stated that there are "two routes" by which the approval element may be established. The *Ramey* court held that, first, "'[t]he length and breadth of the [military's] experience with the [component]—and its decision to continue using it—amply establish government approval of the alleged design defects.'" 874 F.2d at 950 (quoting *Dowd v. Textron*, 792 F.2d at 412). Second, "the defense will be permitted to a participating contractor so long as government approval of a design 'consists of more than a mere rubber stamp.'" *Id.* (quoting *Tozer*, 792 F.2d at 407-08). The court held that the evidence produced by Martin-Baker established either test, finding *inter alia* that the Navy was aware of the possible hazards of the ejection seat configuration prior to the accident and that the Navy had approved a prototype or "mock-up" of the design. *Id.*

It is the Fourth Circuit's conclusion that Martin-Baker adequately showed approval through the "length and breadth" of the military's experience with the component that directly conflicts with the Fifth Circuit's conclusion that General Dynamics did not. In both cases the Navy approved the design—in *Ramey* through approval of a mock-up, in *Trevino* by building the equipment itself and then actually discovering the design features in question through testing. In both cases, the Navy had prolonged experience with the allegedly defective component. In both cases, the Navy was aware of the possible hazards the component presented. In both cases, the Navy chose to continue using that component with full knowledge. Yet in *Ramey* these facts established approval; in *Trevino* they did not. The incongruity of these two federal circuit court opinions alone is adequate and proper grounds for this Court to grant this Petition for a writ of *certiorari*.

CONCLUSION

As Circuit Judge Jolly stated in his opinion dissenting from the Fifth Circuit's denial of General Dynamics' Petition for Rehearing *En Banc*:

> The United States Supreme Court, only less than a year ago specifically chose to use the word "approve" when it held that "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications." In doing so, the Court selected a less demanding word than any of the synonyms it might have chosen. . . .

876 F.2d at 1155; Appendix at 34a (quoting *Boyle*, 108 S. Ct. 2518).

Historically, the approval element of the government contractor defense has been a simple concept. By overdefining the word, the *Trevino* court has created a morass of confusion unwarranted and unintended by the Supreme Court in *Boyle*. The *Trevino* definition necessarily

draws the judiciary into second-guessing the military, for the court cannot locate the government's exercise of discretion and perform the required analysis of that discretion without probing the quality and character of the military's review. Finally, the *Trevino* definition of approval will discourage contractor participation in the design of military equipment, for under *Trevino* if the contractor undertakes to design military products, the government's discretionary decision-making will virtually make the government a clone for all of the contractor's design choices.

Respectfully submitted,

HERBERT L. FENSTER
Counsel of Record

RAYMOND B. BIAGINI
CHARLOTTE D. YOUNG

McKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Petitioner
General Dynamics Corporation

Date: September 1, 1989

APPENDICES

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 86-2965, 87-2175

GLORIA TREVINO, *et al.*,
Plaintiffs-Appellees,

v.

GENERAL DYNAMICS CORP.,
Defendant-Appellant.

GLORIA TREVINO, *et al.*,
Plaintiffs,

v.

GENERAL DYNAMICS CORP.,
Defendant-Cross Claim Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Cross Claim Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

Feb. 23, 1989

Herbert L. Fenster, Lawrence M. Farrell, Raymond B. Biagini, Risa H. Rahinsky, McKenna, Conner & Cuneo, Washington, D.C., for General Dynamics Corp.

Michael J. Maloney, Houston, Tex., John Daly, Atty., Robert S. Greenspan, Civ. Div., U.S. Dept. of Justice, Washington, D.C., Wayne Fisher, Houston, Tex., Thomas W. Kopf, U.S. Atty., Beaumont, Tex., Hugh Johnston, Trial Atty., Torts Branch, Civ. Div., Dept. of Justice, Washington, D.C., for Gloria Trevino, et al. and U.S.

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

REAVLEY, Circuit Judge:

The families of Navy divers killed in a Navy submarine diving chamber brought this products liability action under the Death On The High Seas Act, 46 U.S.C. App. § 761 *et seq.*, and the federal Admiralty law, 28 U.S.C. § 1333, against General Dynamics Corporation, the designer of the chamber. General Dynamics also filed a cross-claim against the United States claiming that, in the event it was found liable to the plaintiffs, the United States would be liable to General Dynamics under a contractual indemnification clause. Trial was to the court, which held that General Dynamics was liable for the deaths of the divers and that the United States was not liable to General Dynamics under the indemnification clause. *Trevino v. General Dynamics Corp.*, 626 F. Supp. 1330 (E.D.Tex.1986). We affirm the judgment for the families of the divers against General Dynamics and vacate, for lack of jurisdiction, that part of the judgment favoring the United States on contractual indemnity.

I. Factual Background

On the night of January 16, 1982, five United States Navy divers died in an accident aboard the submarine U.S.S. GRAYBACK. The ventilation valve, which al-

lowed air to enter the flooded diving chamber, was not fully open; and as the divers drained the water, a vacuum formed in the chamber.

The U.S.S. GRAYBACK was designed and constructed in the late 1950s as a missile-carrying submarine. It was equipped with two large cylindrical pressure chambers on its forward deck, which were used as storage hangars for the missiles. In the late 1960s the GRAYBACK was converted to a personnel-carrying submarine capable of dispatching divers underwater. One portion of that conversion was the installation of a diver lock-in/lock-out system in the cylindrical pressure chambers. The Navy established the basic design concept for the modifications to the GRAYBACK in a 339-page circular of requirements ("COR") describing the design concepts, including two pages describing the design of the diving hangar and a one-page diagram of the flood and drain system, and selected Mare Island Naval Shipyard ("MINS") as the site for the design and conversion work.

In 1966 and 1967 the Navy contracted with General Dynamics Corporation Electric Boat Division to do the design work on the diving hangar. The contracts required General Dynamics to produce working drawings of the hangar and the lock-in/lock-out system and to assume full responsibility for all necessary technical research, to review its work product to assure compliance with the COR, and to conduct all quality assurance, including inspection of the end product, before issue to the Navy. General Dynamics supplied 37 employees, who worked on-site at MINS and produced 71 pages of detailed working drawings. Each of the drawings was signed by a government employee in a box marked "approved." After General Dynamics completed the drawings, their employees left MINS, and the Navy performed all the manufacturing and conversion work on the GRAYBACK.

The design concept, as stated in the COR, called for a "control bubble," a plexiglass enclosure that would be lighted and filled with air while the diving hangar was flooded, from which a diver could operate all the controls necessary to drain the diving hangar. General Dynamics's design, however, placed the hand wheel control for the ventilation valve adjacent to, but not controllable from, the control bubble.[1] General Dynamics's design did not include a lighted position indicator on the ventilation valve control, a remote valve position indicator, vacuum gauges, safety interlocks, or any other type of warning or safety device to prevent a vacuum or to notify the divers or the crew inside the submarine ("the dry side") of the presence or possibility of a vacuum. The Navy operated the submarine for 13 years without mishap, although Navy personnel noted on at least four occasions that the ventilation valve control was difficult to turn. The Navy never performed nor required a formal design/safety review of the GRAYBACK's diving system prior to the accident.

Following the accident, the Navy conducted an investigation and concluded that the accident was caused by "a combination of design deficiency, material defect, unsound operating procedures, and personnel error." Specifically, the Navy found the following four design deficiencies: that there was no safety interlock mechanism to prevent the opening of the hangar drain valve when the main vent valve was not fully opened; that the only valve position indicator on the main vent valve was a metal tab that was underwater and could not be seen

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[1] General Dynamics argues that the hand wheel was controllable from the bubble. The plaintiffs concede that a diver could turn the wheel without leaving the plexiglass enclosure but point out that the wheel was under water and that the divers were generally fully submerged when operating the control. It is undisputed that the hand wheel control was not visible from the air bubble. Therefore, we accept the district court's finding that, as a practical matter, the ventilation valve was not controllable from the air bubble.

when draining the hangar; that there was no remote position indicator that could be seen from the dry side of the hangar; and that the general design of the hangar made proper maintenance of the main vent valve extremely difficult, "if not impossible." *Trevino v. General Dynamics Corp.*, 626 F.Supp. at 1332-33. The district court found that both the Navy and General Dynamics were negligent and that the design was dangerously defective. General Dynamics was negligent in failing (1) to provide for a safety interlock device, (2) to provide for a valve position indicator that is visible when draining the hangar, (3) to provide for a remote position indicator that could be seen from the dry side, (4) to design the valve so that proper maintenance was possible, (5) to adhere to the Navy's COR requiring that the vent valve be controllable from the control bubble, (6) to warn the Navy about the dangers associated with the design's potential to create a partial vacuum, and (7) to warn or instruct the Navy concerning the failure to provide for basic safety and warning devices. The Navy was negligent in failing (1) to provide for basic safety features in its COR, (2) to perform sufficient operational testing, (3) to conduct a formal design review of the system, and (4) to properly lubricate and maintain the shaft to the main hangar vent valve. The court attributed 80% of the fault to General Dynamics and 20% of the fault to the Navy.[2] Although many aspects of the faulty de-

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[2] The trial court noted that the finding as to the Navy "is merely superfluous as the Court has already ruled that the United States is immune from the Plaintiff's direct suit under the *Feres-Stencel* doctrine." 626 F.Supp. at 1333. As will be explained hereafter, the district court's findings of negligent conduct by the Navy, with the exception of its finding that the Navy failed to properly lubricate and maintain the shaft, are also superfluous because these acts by the Navy are discretionary functions. The Navy may delegate the design and testing of military equipment to a private contractor, and the Navy need not perform a design or safety review of the

sign and the improper maintenance of the system contributed to the accident, the fundamental design defect was that the design of the hangar made it impossible for the diver who was draining the system to know whether the vent valve was fully open and that there was no back-up system of any sort to prevent a vacuum or to warn the diver or the crew if the diver did begin to drain the hangar while the vent valve was partially closed. None of the parties on appeal question the correctness of the finding that the design was defective.

The parties do dispute whether General Dynamics, as a government contractor, is responsible for the injuries caused by its defective design. The principal question presented in this case is what are the contours of the government contractor defense recognized by the United States Supreme Court in *Boyle v. United Technologies Corp.*, —— U.S. ——, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

II. A Government Contractor's Derivative Immunity

Prior to the *Boyle* decision, this circuit and others had recognized under federal common law a defense that protected government contractors from liability in products liability actions based on injuries to servicemen caused by defectively-designed military equipment. *See Bynum v. FMC Corp.*, 770 F.2d 556, 574 (5th Cir. 1985); *see also Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986), *cert. denied*, —— U.S. ——, 108 S.Ct. 2897, 101 L.Ed.2d 931 (1988); *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 738 (11th Cir. 1985); *In re Air Crash Disaster at Mannheim Germany on Sept. 11, 1982*, 769 F.2d 115, 122 (3d Cir. 1985), *cert. denied, Schoenborn v. Boeing Co.*, 474 U.S. 1082, 106 S.Ct. 851, 88 L.Ed.2d 891 (1986); *Tillett v. J. I. Case Co.*, 756 F.2d 591, 597 (7th

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contractor's work. The government is not answerable in court for its delegation of these decisions when the contractor is negligent.

Cir. 1985); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). This immunity for government contractors was derived from the government's immunity under the *Feres-Stencel* doctrine.[3] *See Bynum*, 770 F.2d at 565; *see also McKay*, 704 F.2d at 449 ("The reasons for applying the government contractor defense to suppliers of military equipment with design defects approved by the government parallel those supporting the *Feres-Stencel* doctrine."). *Bynum* established the following elements for the government contractor defense:

> To establish the government contractor defense, a military contractor must first demonstrate that the government is immune from liability under the *Feres-Stencel* doctrine. . . . Second, the military contractor must prove that the government established reasonably precise specifications for the allegedly defective military equipment and that the equipment conformed to those specifications. . . . Finally, it must be shown that the military contractor warned the government about errors in the government specifications or dangers involved in the use of the equipment that were known to the contractor but not to the government.

770 F.2d at 574. The primary purpose behind this formulation of the defense is to prevent the contractor from being held liable when the government is actually at fault

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[3] *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), held that a soldier may not sue the United States for injuries caused by the negligence of his superior officers or the government if those injuries were incident to his military service. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), extended *Feres* and held that the United States is immune from liability to a government contractor for contribution or indemnity when a soldier has recovered against a government contractor for injuries partially caused by the negligence of the government.

but is protected by the *Feres-Stencel* doctrine. *See* id. at 565.

A. The *Boyle* Defense

The Supreme Court in *Boyle v. United Technologies Corp.*, —— U.S. ——, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), recognized the government contractor defense. The Court's opinion began with fundamentals, noting that state tort law is preempted by federal common law in areas of unique federal interests and holding that the procurement of equipment by the United States is such an area. *See id.* 108 S.Ct. at 2513-15. The scope of the displacement of state law is defined by the elements of the defense that the Court adopted.

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 2518. The Court specifically rejected the *Feres-Stencel* doctrine as the basis for this defense, and instead grounded the defense in the policies underlying the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). *Id.* at 2517.

With the exception of discarding the first *Bynum* element, the Supreme Court's articulation of the elements of the government contractor defense is virtually identical to the existing Fifth Circuit law. As we noted recently, the *Boyle* opinion "does not change the law in this and other Circuits, except to reject the ideological basis for contractor immunity based upon the *Feres* doctrine." *McGonigal v. Gearhart Indus., Inc.*, 851 F.2d 774, 777 (5th Cir. 1988). Yet that change may be significant. The

discretionary function exception, 28 U.S.C. § 2680(a), excepts from the FTCA consent to suit "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." The Supreme Court noted that this statutory provision "demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of government procurement" and held that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision." 108 S.Ct. at 2517. The Supreme Court's rejection of the *Feres-Stencel* doctrine as the basis for the defense means that the purpose behind the three elements of the defense is not the attainment of the policies identified in *Feres* and in *Bynum*, but deference to the discretionary functions of the government.

The district court applied the three elements of the defense almost exactly as stated in *Boyle*. *See* 626 F. Supp. at 1334-35. Although government employees signed each page of the working drawings indicating their approval of the design, the district court held that "the level of review here was not sufficient to constitute 'approval.'" *Id.* at 1336. Thus, this case presents the question, unresolved by the Supreme Court, of what constitutes "approval" under the first element of the *Boyle* defense.

B. "Approval" Under *Boyle*

Assuming for the moment that the signatures denoting government approval of General Dynamics's designs were made without any sort of review or evaluation of the designs, that they were mere bureaucratic rubber stamps, that they signified at most the government's decision to allow General Dynamics to make all of the important design choices and the government's confidence in Gen-

eral Dynamics's ability to do so, would such "approval" be sufficient to satisfy the first element of the *Boyle* defense? The majority in *Boyle* did not define approval, but the dissent clearly feared such a possibility arising from the majority's formulation of the defense: "Respondent is immune from liability so long as it obtained approval of 'reasonably precise specifications'—perhaps no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them." *Boyle*, 108 S.Ct. at 2519 (Brennan, J., dissenting).[4] Actually, the sufficiency of the government approval was not an issue in *Boyle*. The Fourth Circuit had noted that the Navy and the contractor had worked closely together on the design, that there was abundant evidence of back-and-forth discussions and exchange of information between the contractor and the Navy, and that the Navy had reviewed fully and had approved the final design. *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414-15 (4th Cir. 1986), *aff'd*, —— U.S. ——, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

We hold that "approval" under the *Boyle* defense requires more than a rubber stamp. First, the Court's rejection of the *Feres-Stencel* doctrine in favor of the discretionary function exception as the basis for the defense tells us that the purpose of the defense is to protect the discretionary functions of the government and that, therefore, approval under the defense must constitute a discretionary function. Second, our reading of the case law defining the notion of a "discretionary function" reveals that not all government acts involving some element of choice are discretionary functions, but only those that involve the use of policy judgment. When the gov-

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[4] In *Bynum*, we also left this question open by refusing to decide what level of government participation in generating design specifications was necessary to satisfy the approval requirement. *See* 770 F.2d at 574 n. 23.

ernment merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion. A rubber stamp is not a discretionary function; therefore, a rubber stamp is not "approval" under *Boyle*.

In considering the first element of the *Boyle* defense in a case like this one, the trier of fact will determine whether the government has exercised or delegated to the contractor discretion over the product design. The government exercises its discretion over the design when it actually chooses a design feature. The government delegates the design discretion when it buys a product designed by a private manufacturer; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards established by the government. If the government delegates the design discretion to the contractor, the exercise of that discretion does not revert to the government by the mere retention of a right of "final approval" of a design nor by the mere "approval" of the design without any substantive review or evaluation of the relevant design features or with a review to determine only that the design complies with the general requirements initially established by the government. The mere signature of a government employee on the "approval line" of a contractor's working drawings, without more, does not establish the government contractor defense. The trier of fact should not evaluate the wisdom or quality of any government decision, but must locate the actual exercise of the discretionary function. If the government contractor exercised the actual discretion over the defective feature of the design, then the contractor will not escape liability via the government contractor defense—the gov-

ernment's rubber stamp on the design drawings notwithstanding.[5]

That *Boyle* requires more than a rubber stamp is clear from its formulation of the elements of the defense, each of which serve to locate the exercise of discretion in the government. Under the first element the government must approve *reasonably precise specifications.* The requirement that the specifications be precise means that the discretion over significant details and all critical design choices will be exercised by the government. If the government approved imprecise or general guidelines, then discretion over important design choices would be left to the government contractor. The same is true for the second element, which requires that the equipment conform to the specifications. If the contractor were free to deviate from the government's specifications, then dis-

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[5] General Dynamics takes issue with the trial court's conclusion that under any other reading of the approval requirement "the government contractor's defense would seem always to apply and contractors would never be liable for a defective product because the government would always be in a position to approve a contractor design." 626 F.Supp. at 1337. But the district court was correct. If the signature of a government employee on a design drawing in a box marked "approved" establishes the first element of the government contractor defense as a matter of law, government contractors would make sure that they would never face liability for defective design of military equipment merely by bargaining for a guarantee that some federal employee would place his signature at the bottom of every sheet of paper involved in the design of a product and thus confer the government's "approval." Such a provision likely would be agreed to by the government because it would come at absolutely no cost. Actual review and evaluation of design decisions, however, does come at a cost to the government. That is why the government must decide whether to exercise the design discretion itself or to delegate that discretion to the government contractor. As the district court noted "[i]n the real world, although the government and the contractor may jointly work together in producing specifications, the level of participation always varies. Sometimes the government's participation is minimal at best. That is the very case here." *Id.*

cretion over the design choices would be exercised by the contractor, not by the government.[6] *Boyle* noted that "[t]he first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—*i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." 108 S.Ct. at 2518.[7] It would be absurd, then, to fashion a rule that allowed liability when the specifications were not sufficiently precise or when the contractor deviated from the specifications while disallowing liability when the federal officer signing the design approval did not review or understand the specifications or care whether the contractor deviated from them. As we noted in *Bynum*, the purpose of the test is to deny the defense to a government contractor 'that is itself ultimately responsible for the design defect." 770 F.2d at 574.

The third element of the *Boyle* defense requires that the government contractor warn the government when

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[6] It could be asserted that the second element functions only to remove the government contractor defense for manufacturing defects, and is not about discretion at all. But *Boyle* specifically stated that the three elements established a defense to "[l]iability for design defects in military equipment." 108 S.Ct. at 2518. A manufacturer is liable for manufacturing defects no matter who designed or approved the specifications. As we noted in *McGonigal*, "military contractor immunity does not apply in cases of defective manufacture." 851 F.2d at 777.

[7] The Supreme Court's use of the terms "approved" and "considered" is unfortunate. Taken out of context these terms might suggest that a rubber stamp is sufficient. But we must note that the term "considered" is linked in the sentence to the notion of a discretionary function and is meant to indicate that the government has exercised discretion. The exercise of a discretionary function cannot be equated with a rubber stamp approval. Moreover, the Court's statement indicates that the government's cognizance of the relevant design features must be on a par with that of the government contractor. At a minimum, the federal officer approving the design must not only sign it but know what is there.

the contractor has information which the government lacks. This element clearly contemplates that the government's approval of the design will involve informed decisions and considered choices. As we noted in *Bynum*, the primary purpose of the warning element is "to enable the government to make determinations as to the design and use of military equipment based on all readily available information." *Id.* at 574. The Court's inclusion of a warning element must indicate that approval requires some level of evaluation and review; otherwise a government contractor might argue one day that it should have the benefit of the defense despite its failure to give a warning because the government had rubber-stamped the design, because the information withheld would have been of no use to the government and was not desired by the government, and because the provision of the information would not have affected the government's "approval" of the design. The Supreme Court noted that the warning requirement prevents the defense from creating an incentive to withhold information: "We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decisions." 108 S.Ct. at 2518. That purpose would be a farce if the government could approve specifications without evaluating them.

In discussing the federal interests involved, *Boyle* gives two hypothetical cases in which the government contractor defense would not apply. First, if the United States contracts for the purchase and installation of an air conditioning unit, specifying the cooling capacity but not the precise manner of the construction, and the state law required a duty of care to include a certain safety feature, "no one suggests that state law would generally be preempted in this context." 108 S.Ct. at 2516. Second, if a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped

with improperly designed escape hatches, the government's order would not establish its significant interest in that particular design. "That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered." *Id.* These examples do not square with an interpretation of the *Boyle* defense that contemplates approval without evaluation. In both cases the government has no interest in the defective design feature because the contractor, not the government, exercised discretion over the design choice. If discretion is unimportant to approval, if the government may approve by rubber stamp, then the government ought to be able to approve the design by accepting and using the air conditioning unit or by ordering and accepting delivery of the helicopters. *Boyle* clearly indicates that such "approval" would be insufficient.

Decisions in the circuit courts prior to *Boyle* also support our holding. The Third Circuit flatly held that the government's approval must consist of "more than a mere rubber stamp." *In re Aircrash Disaster*, 769 F.2d at 122. The Third Circuit held that the government's approval of a design satisfies the first element of the government contractor defense if it comes "after a substantive review of the specifications." *Id.* at 123. The case of *Shaw v. Grumman Aerospace Corp.*, 593 F.Supp. 1066 (S.D.Fla.1984), *aff'd*, 778 F.2d 736 (11th Cir.1985), *cert. denied*, —— U.S. ——, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), presents almost exactly the same relationship between the United States Navy and a military contractor as we find in the present case. *Shaw* concerned defects in the design of the Navy's A-6 aircraft. The district court found that the Navy provided general performance, mission and criteria specifications to Grumman, that Grumman exclusively designed the aircraft and submitted the detailed specifications to the Navy, that

the Grumman drawings were routinely examined and approved by Navy personnel, that the Navy did not evaluate the design data or check the accuracy or compliance of the drawings, that Grumman in fact had final control of the design of the aircraft, that Grumman decided to use a defectively-designed stabilizer system on the aircraft, and that the Navy was not aware of the design defect at the time of approval. *Id.*, 593 F.Supp. at 1070-73. Moreover, after the defect was discovered by the Navy, the Navy requested Grumman to solve the problem. Grumman designed "self-retaining bolts" for the stabilizer system, and the Navy installed them as instructed, but this modification was also defective. 778 F.2d at 738. Although the district court explicitly found the Navy had approved the defective design, both the district court and the Eleventh Circuit discounted that approval because it was merely a rubber stamp. The Eleventh Circuit noted that the Navy "relied" on Grumman's advice and that the approval did not constitute an "informed military decision." *Id.* at 747. The Eleventh Circuit affirmed the holding that the military contractor defense was not available to Grumman, but that court went further and changed the elements of the defense. The new defense did not examine the exercise of discretion but keyed immunity to the level of contractor participation in the design process. *See id.* at 746.

The Supreme Court in *Boyle* specifically rejected the Eleventh Circuit's formulation of the military contractor defense: "[I]t does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." 108 S.Ct. at 2518. *Boyle* rejected the *Shaw* formulation of the defense because it was not "designed to protect the federal interests embodied in the 'discretionary function' exception." *Id.* But the Supreme Court never indicated that the result

reached in *Shaw* was incorrect.[8] The district court in *Shaw* had applied the formulation of the defense that was adopted in *Boyle* and held the Navy's "approval" of the A-6 was insufficient to satisfy the government contractor defense. *See* 593 F.Supp. at 1074.

Not only does a careful analysis of the elements of the government contractor defense suggest that a rubber stamp is insufficient approval, the Supreme Court's rejection of the *Feres-Stencel* doctrine and recognition of the discretionary function exception as the basis for this defense mandates that result. In *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir.1983), the Ninth Circuit was confronted with an older case that had apparently conditioned the government contractor defense upon the exercise of design discretion. In *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir.1961), a private firm had contracted with the government to build a dam, and the contract had specified the location, height, and some performance requirements of the upstream cofferdam but left the design, materials and method of construction to the discretion of the contractor. The Ninth Circuit held that the government contractor defense was not available to shield the contractor from liability for damages caused by the collapse of the defective cofferdam. *Id.* at 15-16. The *McKay* court concluded "[u]nder these circumstances, *Merritt, Chapman* properly precludes the government contractor rule. When only minimal or only very general requirements are set for the contractor by the United States the rule is inapplicable." 704 F.2d at 450. But the *McKay* court went on to hold that "[t]he situation is different where the United States *reviewed and approved* a detailed set of specifications." *Id.* (emphasis added). But

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[8] In fact, the Supreme Court denied the petition for writ of certiorari, —— U.S. ——, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), and a petition for rehearing, —— U.S. ——, 109 S.Ct. 10, 101 L.Ed.2d 961 (1988), in the *Shaw* case after its decision in *Boyle*.

the question remained how much review is necessary and what constitutes approval. The Ninth Circuit held that "[i]t is at this point that the *Feres-Stencel* doctrine comes sharply into focus," *id.*, and concluded that the *Feres-Stencel* doctrine required a broader application of the rule than *Merritt, Chapman* might suggest, *id.* 704 F.2d at 450-51. Yet, the Supreme Court in *Boyle* rejected *Feres-Stencel* as the basis of the government contractor defense both because it was too narrow in that it did not cover suits by civilians and because it was too broad in precluding recovery for some injuries that were not in any way the result of the exercise of government discretion. *See Boyle*, 108 S.Ct. at 2517. *Boyle* rejected the *Feres-Stencel* doctrine because it defines the federal interests in terms of the military subject matter of the case, regardless of whether any discretion was exercised by the government.

The Supreme Court's choice of the discretionary function exception is also important because it imports into this area of the law the policies underlying that provision, which are quite different from those underlying the *Feres-Stencel* doctrine, and a rich case law defining what the government's exercise of discretion is and what it is not. The *Feres-Stencel* doctrine is strictly based on separation of powers concerns and the need to prevent any sort of "second-guessing" of military orders by civilian courts. *See Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 2059, 52 L.Ed.2d 665 (1977).[9] The discretionary function exception also seeks to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in

[9] *See also Tozer*, 792 F.2d at 406 (holding that the pre-*Boyle* military contractor defense is heavily dependent on *Feres* doctrine considerations and that the defense seeks to prevent courts from second-guessing military decisions); *Bynum*, 770 F.2d at 563 (same).

tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814, 104 S.Ct. 2755, 2765, 81 L.Ed.2d 660 (1984). However, this policy is balanced against the "broad and just purpose" of the FTCA to compensate victims of negligence in the conduct of governmental activities. *Indian Towing Co. v. United States*, 350 U.S. 61, 68, 76 S.Ct. 122, 126, 100 L.Ed. 48 (1955).

Courts have found it "unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception." *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764; *see also Williamson v. United States Dept. of Agric.*, 815 F.2d 368, 374-75 (5th Cir.1987) (noting the difficult task of divining the boundaries of governmental discretion). The Supreme Court has held that the discretionary function exception turns on "the nature of the conduct, rather than the status of the actor," that the provision covers acts by all federal employees, regardless of rank, if the challenged acts are of the "nature and quality" to fall within the exception. *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764. The court must determine whether the judgment exercised is of the kind that the discretionary function exception was designed to shield. *Berkovitz by Berkovitz v. United States*, —— U.S. ——, 108 S.Ct.1954, 1959, 100 L.Ed.2d 531 (1988). The courts have been adamant about one point, however: not all decisions made by government employees are covered by the discretionary function exception. "Every act of a rational being involves some choices," and the discretionary function exception must be read carefully or it will totally insulate the government from tort liability. *Collins v. United States*, 783 F.2d 1225, 1233-34 (5th Cir.1986) (Brown, J., concurring). Courts have generally drawn a line between decisions at a planning level, or decisions that exercise policy judgment, and decisions at a operational level, or decisions that are merely incident to carrying out a govern-

ment policy. *See Dalehite v. United States*, 346 U.S. 15, 35-36, 73 S.Ct. 956, 968, 97 L.Ed. 1427 (1953). "Discretionary decision-making . . . is accompanied by non-discretionary acts of execution, whether termed operational, ministerial, or clerical." *Payton v. United States*, 679 F.2d 475, 480 (5th Cir. Unit B 1982) (en banc). Once the government makes a discretionary decision, the discretionary function exception does not apply to subsequent decisions made in the carrying out of that policy, "even though discretionary decisions are constantly made as to how those acts are carried out." *Wysinger v. United States*, 784 F.2d 1252, 1253 (5th Cir.1986). The decisions of this circuit have been extraordinarily careful to avoid any interpretation of the discretionary function exception that would embrace any governmental act merely because some decision-making power was exercised by the official whose act was questioned. *See, e.g., Denham v. United States*, 834 F.2d 518, 520 (5th Cir.1987) (noting that the "government's approach would subsume practically any decision within the discretionary function exception and thereby vitiate the FTCA"); *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.) (noting that a broader reading of the exception would destroy the "corpuscular vitality" of the Federal Tort Claims Act), *cert. denied*, 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967).

Although the planning/operational distinction does not always work, a government decision, at a minimum, must involve judgment or policy choice to fall within the discretionary function exception. *See Berkovitz*, 108 S.Ct. at 1958-59; *Dalehite*, 346 U.S. at 34, 73 S.Ct. at 967. The discretionary function exception "properly construed, therefore protects only governmental actions and decisions based on considerations of public policy"; discretionary decisions involve "the permissible exercise of policy judgment." *Berkovitz*, 108 S.Ct. at 1959. The *Boyle* Court noted that the selection of the appropriate

design for military equipment to be used by our armed forces is a discretionary function because it involves "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." 108 S.Ct. at 2517.

In discretionary function cases, the Supreme Court has recognized that a government agency may delegate its discretion to private parties. In *Varig Airlines*, the government answered a suit against the FAA for certifying a dangerously defective plane that the responsibility for safety rests with the airplane manufacturer and that the government may enforce those safety standards with "spot checks"; the Court agreed and held that the government's decision to use spot checks was a discretionary function. 467 U.S. at 815, 104 S.Ct. at 2765. The Court specifically noted that the discretionary function exception protects "policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer." *Id.* at 820, 104 S.Ct. at 2768. In fact, the *Boyle* Court noted that "[t]he design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design." 108 S.Ct. at 2518.[10]

If the government has chosen to delegate its design discretion to a private contractor, however, the govern-

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[10] It must be noted that, although the government's decision to delegate its discretion on a matter to a private contractor is itself a discretionary function, that is not the discretion with which the government contractor defense is concerned. The discretionary function at issue in the government contractor defense is that discretion involved in "selecti[ng] the appropriate design for military equipment to be used by our armed forces." 108 S.Ct. at 2517. The three elements of the government contractor defense determine whether the government exercised the *design* discretion or delegated that discretion to the government contractor.

ment does not exercise a discretionary function by merely approving the contractor's work. This circuit confronted that issue in *Butler v. United States*, 726 F.2d 1057 (5th Cir.1984). In *Butler* the families of eight persons who had drowned in an underwater depression created by an Army Corps of Engineers project sued the government and the private contractors that had performed work for the Army Corps of Engineers. The project was the repair of a seawall in Hancock County, Mississippi, that was damaged in a hurricane. The sand needed for the repair was obtained by the dredging the Mississippi Sound, thereby creating a depression in shallow water near a popular beach. The Army Corps of Engineers contracted out the operation to Farrell Construction Co., who subcontracted parts of it to two other companies. The contract provided that the Army Corps of Engineers would retain ultimate control, would approve all plans, shop drawings, construction practices, methods and materials and that completion of the project was subject to the inspection and acceptance by the Corps. The contract also required the posting of warning signs for swimmers. The suit alleged that the warnings were inadequate. *See id.* at 1059-60. In determining the government's liability, this court held that the preparation of the contract was a discretionary function but that the "controlling, supervising, contracting and carrying out of the contract" were not discretionary; those actions were operational in nature and did not enjoy immunity under the discretionary function exception. *Id.* at 1062. This court held that the decisions by the Army Corps of Engineers to repair the seawall and to dredge the sound were discretionary, but "once these decisions were made, the Government was no longer exercising a discretionary function." *Id.* at 1063. This is not to say that it is impossible for the government to exercise a discretionary function when supervising a private contractor, but only that once the government has delegated authority to the private contractor to make important choices, the gov-

ernment does not exercise a discretionary function by merely accepting the contractor's work.[11]

To summarize: The government contractor defense as reformulated in *Boyle* protects government contractors from liability for defective designs if discretion over the design feature in question was exercised by the government. If the government delegates its design discretion to the contractor and allows the contractor to develop the design, the government contractor defense does not apply. If the government has so delegated its discretion to the contractor, mere government acceptance of the contractor's work does not resuscitate the defense unless there is approval based on substantive review and evaluation of the contractor's design choices. A mere rubber stamp by a federal procurement officer does not constitute approval

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[11] Our recent case of *Gordon v. Lykes Bros. S.S. Co.*, 835 F.2d 96 (5th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 73, 102 L.Ed.2d 50 (1988), illustrates this point. During World War II, the United States decided to operate a fleet of merchant ships, and the government gained control of ships that had been built by private manufacturers and previously owned by private parties and that had asbestos insulation. The government continued to operate these ships and expose the sailors to asbestos fibers, and the government did not institute any sort of safety program. Some of the *Gordon* plaintiffs sued for injuries caused by this exposure to asbestos. Although the decisions that caused the sailors to be exposed to asbestos were seemingly operational, and indeed the decision to incorporate asbestos into the design of these ships was made by private parties prior to the government's gaining control of them, this court held that the government's decisions to expose sailors to asbestos fibers fell within the discretionary function exception. *Id.* at 99. This holding, however, was based on "a substantial amount of historical evidence" showing that the decision to expose U.S. sailors to asbestos was a considered policy choice. *Id.* at 100. Although the result is unusual, *Gordon* does not mark a departure in Fifth Circuit discretionary function law. *Gordon* suggests that the government can exercise discretion in approval only if the government reviews and evaluates the choices made by the private contractor.

and does not give rise to the government contractor defense.

C. The District Court's Application of the Defense

General Dynamics argues that the Navy approved the design specifications set forth in each of the General Dynamics' working drawings, and points to the signature of a government official in a box marked "approved" at the bottom of each of the working drawings. The district court, however, found that "the level of review here was not sufficient to constitute 'approval'." 626 F. Supp. at 1336. The district court held that contracts "left design entirely to the discretion of General Dynamics. The Navy set only general performance standards leaving the details to General Dynamics." *Id.* at 1335-36. The district court held that the COR promulgated by the Navy was "silent" on the questions of the precise location of the main hangar vent valve and the use of warning or safety devices. "The evidence shows that such determinations were left to the discretion and expertise of the General Dynamics designers assigned to prepare the working drawings." *Id.* at 1336. These findings are not clearly erroneous. The record reveals that Navy personnel at MINS assigned a relatively low priority to the GRAYBACK work and delegated their design discretion to General Dynamics. Paul Lawrence, the section leader of the Navy group in charge of the hangar flood and drain system design for the GRAYBACK, wrote in a memo to his superiors at MINS in 1969: "The design work on the GRAYBACK was initially given a low work priority due to more important shipyard work. . . . Due to this extremely heavy workload the piping branches were required to assign less experienced engineers/technicians to GRAYBACK than would normally be assigned. In many cases, farm-in personnel were used to man the GRAYBACK work. . . . Most of the GRAYBACK design work was accomplished by farm-in contractor personnel and not checked by Mare Island experienced technical peo-

ple."[12] After the accident, the Navy investigation concluded that one of the problems with the GRAYBACK design was the absence of a formal Navy design review.[13] Because the record clearly shows that "General Dynamics, rather than the government, was ultimately responsible for the design defects in the [diving] hangar aboard the GRAYBACK," *id.* at 1338, the district court was correct in holding that the approval element of the government contractor defense was not satisfied.

The district court noted that the second element, that the product comply with the design specifications, was not implicated in this case because General Dynamics only did the design work, not the manufacturing of the

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[12] The district court also noted the "disparity in the level of experience between the Navy and General Dynamics." It held that this imbalance of knowledge prevented the Navy from undertaking any substantial review of the specifications. 626 F.Supp. at 1337. It is not for the court to undertake to evaluate the quality of the government's review. The only factual question is whether the government actually exercised design discretion. If the government intended to exercise its discretion over the design of a product and a government official undertakes to substantially review, evaluate, and then approve the design, the first element of the *Boyle* test is satisfied even if the government official doing the review was incompetent or negligent. The government's use of clearly unqualified individuals to review and approve highly technical design work, however, may be evidence that the government does not intend to exercise design discretion but is merely rubberstamping the contractor's design specifications. That seems to be the case here.

[13] It must be emphasized that the absence of review is critical in this case. The Navy actually did the manufacturing and conversion work. The defective aspects of the design and the dangers of the vacuum were so obvious that the Navy must be charged with knowledge of the defect; yet the Navy built the diving hangar as designed and operated it for thirteen years. The Navy had control over the product and had every opportunity to exercise discretion over the design. This the Navy did not do. Both the Navy investigation and the district court faulted the Navy for its *failure* to exercise discretion over the design.

product. *Id.* at 1337-38. Furthermore, it is undisputed that the Navy in converting the GRAYBACK followed General Dynamic's specifications exactly. The district court noted, however, "that the system as designed by General Dynamics *did not even* conform to the general requirements provided by the government." *Id.* at 1338. Under the General Dynamics design the vent valve was not controllable from the air bubble as required by the COR. This finding does not go to the second element because the working drawings, not the COR, were the reasonably precise specifications.[14]

The district court also held that General Dynamics had failed to prove the final element of the defense, that it had warned the government about the dangers in the use of the equipment that were known to the contractor but not to the United States. The district court committed two errors in this holding. First, it held General Dynamics to a duty to warn the government of dangers about which it "knew or should have known." After *Boyle* a government contractor is only responsible for warning the government of dangers about which it has actual knowledge. Second, the district court held that General Dynamics should have warned the Navy of the possibility that a vacuum would form while draining the diving hangar, even though both the Navy and General Dynamics knew or should have known of the dangers associated with the system's potential to create a partial vacuum. After *Boyle*, a government contractor only has

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[14] The Navy did undertake to review the working drawings for compliance with the COR but approved the drawings even with this alleged noncompliance. It is important to note, however, that such review, mere review for compliance with very general performance criteria, is insufficient to satisfy the first element of *Boyle*. If the government sets very general criteria for a design and delegates its design discretion over all of the critical details to a government contractor, the government does not exercise design discretion by merely reviewing the completed design for compliance with the general criteria.

the duty to warn the government of dangers of which it has knowledge but the government does not. Because both General Dynamics and the Navy knew that the system as designed could create a partial vacuum, and because both the Navy and General Dynamics could see that the final design included no safety devices, liability of General Dynamics could not be based upon non-disclosure of these dangers. Because the Navy delegated its design discretion to General Dynamics, however, and thus never approved reasonably precise specifications within the meaning of *Boyle*, the district court's holding that the government contractor defense was not available to General Dynamics in this case was correct.

III. The Borrowed Servant Doctrine

General Dynamics alternatively argues that its employees who worked on the design of the GRAYBACK at MINS were borrowed servants of the Navy and therefore the Navy, and not General Dynamics, was responsible for their defective design choices. The district court, however, held that "General Dynamics was an independent contractor given discretionary, independent decision-making authority and, therefore, its employees were not borrowed servants of the government." 626 F. Supp. at 1340. Whether an employee of one is a "borrowed servant" of another is a factual question. Among the considerations for determining whether a servant has been borrowed by another employer are who has control over the employees and the work he is performing, beyond mere suggestion of details or cooperation; whose work is being performed; and who pays the employee. *See Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 376 (5th Cir. 1985). No one factor or combination of factors is decisive and no test has been fixed to determine the existence of a borrowed servant relationship. *Id.* The degree of control an employer has over the employee and the employee's work, however, has generally been considered to be the most important of the considerations.

See West v. Kerr-McGee Corp., 765 F.2d 526, 530-31 (5th Cir. 1985); *Hebron v. Union Oil Co. of California*, 634 F.2d 245, 247 (5th Cir. Unit A Jan. 1981).

The district court's findings of fact on the government contractor defense largely answer this issue as well. The Navy contracted with General Dynamics to have General Dynamics perform a specific task for the Navy and delegated the Navy's design discretion over the GRAYBACK conversion to General Dynamics. The Navy did not, therefore, control the work of General Dynamics or its employees. The district court also found it significant that the Navy hired General Dynamics specifically because its employees were experienced and would not need supervision, that the Navy did not intend to control or supervise the particulars or actual details of the General Dynamics employees' work, that the Navy did not direct the tasks of General Dynamics's employees but spelled out specifically their duties in a contract, that General Dynamics maintained its employer/employee relationship and retained the obligation to pay its employees, and that General Dynamics maintained an administrative structure among its employees while they were at the MINS facility. 626 F. Supp. at 1339-40. The district court's findings are not clearly erroneous.

IV. The Navy's Negligence

General Dynamics next argues that the district court's findings of causation were clearly erroneous and that the negligence of the United States Navy was the sole cause of the accident. Under Texas law, "[t]he act of a third person which intervenes and contributes a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer if that act ought to have been foreseen." *Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex.1970). General Dynamics, however, notes that under § 452(2) of the *Restatement (Second) of Torts* (1965) the duty to prevent harm to another threat-

ened by the actor's negligent conduct may be shifted to a third party if, because of the lapse of time, the magnitude of the risk of harm, the character and position of the third party, his knowledge of the danger or his relationship to the plaintiff, the failure of the third party to prevent the harm is a superseding cause. It is unclear whether Texas recognizes § 452. *Cf. French v. Grigsby*, 571 S.W.2d 867, 867 (Tex.1978) ("Since the advent of comparative negligence with the adoption of art. 2212a, Tex. Rev. Civ. Stat. Ann., this court has sought to abolish those doctrines directed to the old choice between total victory and total defeat for the injured plaintiff.")

General Dynamics's design was negligent; however, the Navy knew or reasonably should have known of the dangers inherent in the design. The Navy chose to use the GRAYBACK as designed and dealt with the possibility of a vacuum by training its employees rather than by modifying the submarine. Furthermore, the Navy exacerbated the dangers by failing to lubricate the shaft of the valve properly, making it more difficult to turn and more likely that a diver would not realize that it was partially closed. Nevertheless, the Navy relied on General Dynamics's design expertise, and that reliance and the Navy's use of the defective design were foreseeable by General Dynamics. Moreover, the Navy's method of dealing with the dangers in the design were effective for thirteen years. The district court held that the Navy's negligence was not the sole cause of the accident and that the circumstances of the Navy's negligence were not of such a character as to sever the chain of causation and shift all responsibility from General Dynamics to the Navy. The district court found that both the Navy and General Dynamics were negligent and assigned 80% of the fault to General Dynamics and 20% of the fault to the Navy. We cannot say that those findings are clearly erroneous.

V. The Indemnification Agreement

The contracts between General Dynamics and the United States provide that the government will indemnify General Dynamics for liabilities arising out of the performance of the contract. The district court held that General Dynamics had failed to satisfy one of the conditions of the contract and was therefore not entitled to indemnification from the government. We hold, however, that the district court was without jurisdiction to consider this question, and we therefore vacate the judgment on this issue.

General Dynamics's claim is a contract claim, and the essence of the claim is to obtain money from the government. The action must proceed, therefore, under the applicable provisions of federal statutes regarding government contracts. *See Amoco Production Co. v. Hodel*, 815 F.2d 352, 361 (5th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 2898, 101 L.Ed.2d 932 (1988). General Dynamics's claim is controlled by the Contract Disputes Act. 41 U.S.C. § 601 *et seq.* Under the Act, § 609(a)(1), a contracting party may bring an action directly on the contract claim against the United States after an adverse decision by a contracting officer concerning the claim. All claims by a contractor against the United States relating to a contract must be submitted in writing to a contracting officer for a decision. 41 U.S.C. § 605(a). General Dynamics never did so prior to filing this counter-claim against the United States. General Dynamics claims that its tender of a defense of this action to the United States Justice Department constituted a claim to a contracting officer. A contracting officer, however, is defined as a person who has the authority to enter into and administer contracts and make determinations and findings with respect thereto. 41 U.S.C. § 601(3). The Justice Department certainly cannot enter into contracts for the Navy and is not a contracting officer for the purposes of the Contract Disputes Act. The decision, or

failure to decide, by a contracting officer is an absolute jurisdictional prerequisite to filing a suit under the Contract Disputes Act. *See Thoen v. United States*, 765 F.2d 1110, 1116 (Fed.Cir.1985); *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971, 227 Ct.Cl. 176 (1981). The district court was therefore without jurisdiction to decide General Dynamics's cross-claim against the United States for indemnification.[15]

The judgment for plaintiffs against General Dynamics is AFFIRMED; the judgment on the cross-claim by General Dynamics, seeking contractual indemnity from the United States, is VACATED.

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[15] The government alleges that General Dynamic's claim failed to comply with the requirements of § 605 in some other important respects. Although these arguments may have merit, General Dynamics never presented that claim to a contracting officer, and we need not reach any of its other deficiencies.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2965

GLORIA TREVINO, *et al.*,
Plaintiffs-Appellees,

versus

GENERAL DYNAMICS CORPORATION,
Defendant-Appellant.

No. 87-2175

GLORIA TREVINO, *et al.*,
Plaintiffs,

versus

GENERAL DYNAMICS CORPORATION,
Defendant-Cross Claim
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Cross Claim
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 2-23-89, 5th Cir., 1989, 865 F.2d 1474)

[Filed June 26, 1989]

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

E. GRADY JOLLY, Circuit Judge, with whom GEE, GARWOOD and JONES, Circuit Judges, join dissenting from denial of petition for rehearing en banc:

> . . . Words strain,
> Crack and sometimes break, under the burden,
> Under the tension, slip, slide, perish,
> Decay with imprecision, will not stay in place,
> Will not stay still . . .
>
> T.S. Eliot, *Burnt Norton*, Part V.

Because I believe that *Trevino* has effectively rewritten the Supreme Court's test for government contractor immunity given in *Boyle*, I respectfully dissent from the denial of en banc review. Further, I believe that en banc review is necessary because *Trevino* is at odds with, if not in conflict with, this circuit's almost contemporaneous opinion in *Smith v. Xerox*, 866 F.2d 135 (5th Cir. 1989), and that we have a responsibility to clarify ourselves. Instead, we leave the bench and bar to divide and argue over whether they can be reconciled, and if not, which will be followed as the law of the circuit.

I

The United States Supreme Court, only less than a year ago specifically chose to use the word "approve" when it held that "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications." *Boyle v. United Technologies*, 108 S. Ct. 2510, 2518 (1980). In doing so, the Court selected a less demanding word than any of the synonyms it might have chosen:

> *Approve* the most widely applicable, may indicate varying degrees of admiration. *Endorse* (or *indorse*), stronger than *approve*, implies expression of support, often by public statement. *Sanction* adds authorization, usually official, to approval. *Certify*

> and *accredit* imply official endorsement gained upon conforming to set standards. *Ratify* refers to making legal by formal official approval. . . .

The American Heritage Dictionary (Second College Edition 1982). Yet the panel in *Trevino* finds that the term "approve" as used in *Boyle* actually means to *establish* reasonably precise specifications, *id.* at 1479; it actually means to "choose" a design feature, *id.* at 1480; it actually means to exercise judgment or policy choice, *id.* at 1484; it actually means to substantively review and evaluate, *id.* at 1487 n.12; in short, it actually means to exercise a discretionary function within the strict meaning of the FTCA. We learn further in *Trevino* that one cannot "approve" a design by full awareness and acceptance of that design, defect and all, for thirteen years, *id.*; and finally, we learn that "approve" is a term that cannot be applied to work done by someone else, *id.* at 1486 ("If the government delegates its design discretion to the contractor and allows the contractor to develop the design, the government contractor defense does not apply . . . .").

Indeed, the panel, in departing from any plain meaning of the word, dolorously observes that "the Supreme Court's use of the terms 'approve' and 'considered' is unfortunate," *id.* at 2066, n.7. I would doubt, however, that the author of *Boyle* thinks it quite such a mishap. Mr. Justice Scalia was plainly aware of the precise requirements of exercising a discretionary function. He was aware that the "selection" of the appropriate design for military equipment is a discretionary function, 108 S.Ct. at 2517; and he was aware, as Justice Brennan reminded him, that the use of the word "approval" might be construed so broadly as to include rubberstamping, *id.* at 2519. Yet, when he concluded the analysis for the majority, and defined the specific test to be applied, he chose the word "approve." He did not hold that the government must "select" the design, or "choose" the design,

or "review and evaluate" the design, or "exercise its discretion," or any of the other words the panel seeks to substitute for "approve." All of the words that the panel would force on Mr. Justice Scalia, it should be added, were immediately before him as he defined the test, and he chose none of them.

Mr. Justice Scalia specifically explained that government "approval" assures that the design is *within the area* where the discretionary function policy would not be frustrated, because it assures that the design feature in question was *considered* by a government officer and not "*merely* by the contractor itself." *Boyle*, 108 S. Ct. at 2518. This explanation appears immediately after the use of the word "approved" and gives it its meaning. That government involvement be "within the area" does not mean that strict compliance with all of the elements of the discretionary function exception is required. Indeed, the Court indicated that the discretionary function exception only "*suggests* the *outlines* of 'significant conflict' between federal interests and state law in the context of government procurement." 108 S.Ct. at 2517.

I agree with the panel that "approve" is not synonymous with "rubber stamp." It does seem to me, however, that when the government furnishes 339 pages of specifications and involves a review team with the plans, "rubber stamp" is not an apt description of the government's involvement. Generally speaking, I would think that in this case if the government *considered* the plans and affirmatively assented to them, it has "approved"; or if the government, in the panel's words, was "charged with the knowledge of the defect" and accepted the design, especially for a period of years with no complaint, it has "approved" contract specifications within the meaning of *Boyle*. More specifically, I would suggest that an appropriate inquiry under the first *Boyle* prong is to ask: was the challenged feature disclosed with reasonable precision in the accepted design documents, and was the

design accepted on behalf of the government by an officer who had, and knew he or she had, the duty and authority to decline to accept the challenged design feature on safety grounds if he or she deemed it appropriate to do so? I believe this test would be truer to the spirit and deliberately chosen language of *Boyle*.

II

I also dissent from the denial of rehearing en banc in this case because the panel opinion cannot comfortably coexist with our circuit's holding in *Smith v. Xerox*, 866 F.2d 135 (5th Cir. 1989). Both cases were decided on the same day.

Both *Smith* and *Trevino* construe *Boyle*'s first prong of the government contractor defense: that the government have "approved reasonably precise specifications." The cases have different focuses, however. At issue in *Smith* was whether Xerox, the government contractor, was improperly granted summary judgment on its government contractor defense because it had not been able to produce its original specifications. In *Smith*, we looked at the language "reasonably precise," catalogued the information Xerox had produced, and found that from the evidence, the specifications that had been produced satisfied the "reasonably precise" requirements of *Boyle*. Because those specifications had been *approved* by the government, we found that Xerox had satisfied the first prong of the *Boyle* test.

It is true that superficially the holdings of *Smith* and *Trevino* do not appear to be inconsistent. In applying the first prong of the *Boyle* test and asking whether the government "approved reasonably precise specifications," we focused in *Smith* upon the requirement that the specifications be "reasonably precise," not that they be "approved," which is the focus of the *Trevino* opinion. If, however, *Trevino* had been applicable law, our analysis

and holding in *Smith* would surely have been different, since the appeal was from the grant of summary judgment and there was little or no evidence in the record on how extensive the government's "substantive review and evaluation," i.e., approval, had been. Thus, although the opinions may be able to coexist, they can do so *only* because they were simultaneous.

Second, to the limited extent that *Smith* referred to "approval," we quoted the Ninth Circuit in *McKay* to the effect that approval meant "examining and agreeing" to a detailed description of the workings of the system. *Id.* at 138. Further, we referred to the Fourth Circuit's opinion in *Boyle*, and found that the Navy had "approved" reasonably precise specifications, where the contractor and Navy worked together to prepare detailed specifications, engaging in back and forth discussions, and where the Navy reviewed the mock-up and approved the design (all present in *Trevino* to some extent). *Id.* at 138.

Further, we held in *Smith* that the government had satisfied its burden on the first prong of the *Boyle* test, when the government "reviewed and approved Xerox final drawings and specifications." *Id.* at 138.

It is thus suggested in *Smith* that government *review* of the contractor's final precise specifications, followed by assent, is all that is required for contractor immunity, which is a considerably less stringent requirement than imposed by the *Trevino* panel. Thus, I would suggest that there is significant potential for conflict between *Smith* and *Trevino*. In any event, conflict or not, analytical comparison yields confusion. The bench and bar have a right to a clearer statement from us as to what *Boyle* means and how it should be applied.

Finally, I would observe that the *Trevino* panel's microscopic focus on the word "approval," unwarranted by *Boyle*, allows that term to eclipse the significant re-

mainder of the phrase—"of reasonably precise specifications." The phrase "approved reasonably precise specifications" must be interpreted as a whole. It is the approval "of *reasonably precise* specifications" that assures that the government retains veto power over all design details and assures that "the suit is within the area where the policy of 'discretionary function' would not be frustrated." *Boyle*, 108 S.Ct. at 2518. If *Trevino* is sincere when it states that "[t]he requirement that specifications be precise means that the discretion over significant details and all critical design choices will be exercised by the government; if the government approved imprecise or general guidelines, then discretion over important design choices would be left to the government contractor," *Trevino*, at 1418, then it is not clear why the submission and simple approval of reasonably precise specifications cannot serve as a proxy for government involvement in the design decisions.

III

In sum, I do not think that it is necessary to overdefine the word "approved" in order to make certain in these cases that the government has sufficiently exercised its discretion and judgment over the design at issue. With great respect for those whose views seem to differ, because I think that this case is enbancworthy, I respectfully dissent from the failure of the court to grant en banc review.

UNITED STATES DISTRICT COURT
E.D. TEXAS
BEAUMONT DIVISION

Civ. A. No. B-83-573-CA

GLORIA TREVINO, *et al.*

v.

GENERAL DYNAMICS CORPORATION

Feb. 3, 1986

Wayne Fisher, Charles M. Price and Michael J. Maloney, Fisher, Gallagher, Perrin & Lewis, Houston, Tex., for plaintiffs.

Herbert L. Fenster, Lawrence M. Farrell and Raymond B. Biagini, McKenna, Conner & Cuneo, Washington, D.C., for defendant.

MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERT M. PARKER, District Judge.

This case was tried to the Court. It is a case arising under the Death On The High Seas Act, 46 U.S.C. Sec. 761 et seq. and Federal Admiralty Law, 28 U.S.C. Sec. 1333. The Court now enters the following findings of fact and conclusions of law based upon the evidence presented.

A. THE FACTS

On the night of January 16, 1982, five Navy divers lost their lives in an accident aboard a Navy submarine, the USS GRAYBACK. The cause of death was vacuum induced bends. The accident occurred in the starboard hangar diving chamber of the GRAYBACK as the divers were preparing to exit the flooded chamber into the dry side of the hangar. To exit the chamber, it was necessary to drain the water from the wet side. This was to be accomplished by Plaintiff, Petty Officer Bloomer, who was stationed in the "control bubble," a plexiglass enclosure from which he was to open the hangar and valve to allow air into the chamber as the water drained out. After reporting the valve open, Bloomer opened the drain valve to drain the water from the hangar.

The five Navy divers died when a vacuum condition occurred as the chamber was draining. The families of four of the five deceased Navy divers brought this lawsuit against General Dynamics Corporation and the United States alleging strict liability, negligence, and breach of warranty claims.

General Dynamics also filed suit against the United States claiming that, in the event it was found liable to the Plaintiffs, the United States would be liable to General Dynamics under a contractual indemnification clause. This Court, in its September 25, 1985 order, ruled that the indemnity clause of the contracts here involved are valid and enforceable and that, therefore, the United States must as a matter of contract law indemnify General Dynamics for any adjudged liability it may have to the Plaintiffs. Such liability, however, is contingent upon whether or not this Court finds General Dynamics has met the contractual prerequisites for the claimed indemnity.

On the eve of trial, the Court, upon the government's motion, dismissed the Plaintiff's direct complaint against

the United States ruling that the United States was immune from such a suit under the *Feres/Stencel* doctrine. *See Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), *Stencel Aero Engineering Corporation v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977).

The government, nonetheless, still contends that it cannot be liable to the Plaintiffs under any legal theory. However, although it may be true that the government is immune from liability in a direct suit by the Plaintiffs, the same cannot be said where the United States has knowingly and contractually waived its *Feres/Stencel* immunity with respect to the third party suit by the government contractor. *See Order and Memorandum Opinion* of May 29, 1985, discussing and disposing of this issue.

As will be discussed in more detail later, the deaths of these divers was caused chiefly by the negligence of General Dynamics in the work that it performed with respect to the design of the starboard hangar diving system aboard the GRAYBACK during the conversion of the GRAYBACK from a missile-carrying submarine to a personnel-carrying submarine during the 1960's.

The United States Navy contracted with General Dynamics for performance of the design work with respect to the conversion of the diving system because of General Dynamics' experience and expertise in the design of submarine systems. *See* Plaintiff's Ex. 152, p. 43, l. 3-17; p. 44, l. 10-17; *See also* Plaintiff's Ex. 156 p. 63, l. 7-27.

To accomplish the conversion of the GRAYBACK, the United States entered into a series of contracts with General Dynamics. *See* Plaintiff's Ex. 1 and 2. In Plaintiff's exhibit 1, the scope of the work required of General Dynamics is set forth in section 2.7.2, as follows:

> The scope of work required of the contractor for USS GRAYBACK is the furnishing of the engineering effort needed for the preparation of working

drawings, including rip-out plans, planning department instruction sheets, test specifications and other documents necessary to effect conversion to APSS and SUBSAVE. The specific areas in which the contractors shall render assistance are: (after which are listed 24 specific areas of the GRAYBACK conversion including numerous piping, trim and drain, flood vent, ventilation, and air systems).

The responsibilities of General Dynamics with respect to the work that General Dynamics was performing under the contracts is set forth in Section 2.1.4 of the contracts which state:

(1) The contractor shall assume full responsibility for all technical research necessary to accomplish the work specified herein.

(2) All work produced is to be reviewed by the contractor to assure that the conditions set forth in this circular are complied with.

(3) The contractor is responsible for all quality assurance actions pertaining to the design product, plans, etc., including inspection of the end product item before issue.

B. NEGLIGENCE

Following the accident, the United States Navy conducted an investigation, the report and attachments of which have been introduced into evidence as Plaintiffs' Exhibits 27, 40, 41A, 41B, 41C, 42 and 43. The United States Navy found that there were four specific design deficiencies with respect to the starboard hangar diving system in the hangar diving system aboard the GRAYBACK which contributed to the accident. These four design deficiencies are stated as follows:

1. There is no safety interlock mechanism to prevent the opening of the hangar drain valve when the main vent valve is not fully opened.

2. The only valve position indicator on the main vent valve consists of a metal tab which is under water and cannot be seen when draining the hangar.

3. There was no remote position indicator which can be seen from the dry side of the hangar.

4. The general design of the hangar made proper maintenance of the main vent valve extremely difficult, if not impossible.

The Court has no quarrel with the findings of the Navy report, and for the reasons outlined below, concludes that the effort put forth by the Navy and General Dynamics in converting the GRAYBACK constituted negligence which proximately caused the deaths of the divers.

Specifically, General Dynamics was negligent in failing to:

1. provide for a safety interlock device to prevent the opening of the hangar drain valve when the main vent valve is not fully opened;

2. provide for a valve position indicator that is visible when draining the hangar;

3. provide for a remote position indicator which can be seen from the dry side of the hangar;

4. design the hangar so that the main hangar valve could be properly maintained;

5. adhere to the Navy's circular of requirements (COR) calling for the vent valve to be placed inside the control bubble rather than outside as was actually done;

6. warn the Navy about the dangers associated with the design's potential to create a partial vacuum; and

7. warn or instruct the Navy concerning its failure to provide for basic safety features such as safety

interlocks, vacuum gauges, and vent valve open/close indicator lights in the Navy's COR.

Specifically, the Navy was negligent in failing to:

1. provide for basic safety features in its COR which would prevent a partial vacuum from occurring;
2. perform sufficient operational testing;
3. conduct a formal design review of the system; and
4. properly lubricate and maintain the shaft to the main hangar vent valve.

The Court apportions the negligence as follows: 80 percent of the fault is attributable to General Dynamics, 20 percent of the fault is attributable to the Navy. Such a finding as to the Navy, however, is merely superfluous as the Court has already ruled that the United States is immune from the Plaintiff's direct suit under the *Feres/Stencel* doctrine. The Court finds no contributory negligence on the part of the Navy divers.

Before the question of damages can be reached, this Court must address General Dynamics' three contentions which, if accepted, would entitle General Dynamics to the same immunity that the Navy now possesses. The public policy question, the government contractor's defense, and the borrowed contractor's defense, and the borrowed servant doctrine are discussed in turn below.

C. THE PUBLIC POLICY CONSIDERATIONS

General Dynamics argues that as a matter of policy, the Court should exercise judicial restraint and defer to the Navy's conclusions that the design of the hangar vent system was not defective but was adequate and safe for its intended purpose and that the direct, proximate cause of the accident was Plaintiff Bloomer's failure to open the hangar vent valve. This Court does not agree.

In *Bynum v. FMC Corporation*, 770 F.2d 556 (5th Circuit 1985), the Fifth Circuit endorsed, in its entirety, the Supreme Court's admonition of judicial restraint in reviewing military decisions relating to the armed forces. Tracing the historical underpinnings of the government contract defense, the Fifth Circuit noted that the Supreme Court's emphasis "on judicial restraint in military matters is, of course, not surprising." *Id.* at 562. The Court stated that:

> It has long been recognized that interference by civilian courts with military authority inevitably raises both questions about judicial competency in this area and separation of powers concerns.

The Fifth Circuit found that the same policy considerations underlying the *Feres/Stencel* doctrine also are at issue "whether the named defendant happens to be the government or the military contractor." *Id.* at 565. The most important policy consideration in either case is that "civilian courts would be compelled to second guess professional military judgment concerning, at least, the proper equipping of the armed services." *Id.*

Public policy, however, does not require any judicial restraint in this case simply because this Court is not reviewing military decisions relating to the armed forces. The Plaintiffs are not challenging a military decision concerning military operations. The issue is a design decision concerning design defects in the diving hangar aboard the GRAYBACK made by General Dynamics designers. This was purely a non-military decision requiring no military expertise. Nor was there a conscious decision on the part of the military to accept a known hazard because of military considerations.

By example, if the Army had contracted for the design of a tank desiring speed and mobility in combat it might conclude that the tank must be designed with less armor to reduce weight so as to maximize speed and mobility.

Less armor, of course, would offer more risk and less protection to the servicemen inside the tank, but this is clearly a conscious military decision on the part of the Army to accept a known hazard because of the Army's desire for speed and mobility of its tank in combat. Such a decision would not be reviewable in this Court's opinion. That is not the case here. No evidence has been presented to show that the Navy consciously decided on this specific diving system design for military reasons, e.g., to reduce noise under water so as to avoid detection by the enemy.

Furthermore, the Court has found no authority to the effect that the accident reports by the military are conclusive on liability. There are very few cases which even discuss whether military accident reports should be given conclusive weight. The general rule that reports by the military are *not* binding on the courts is stated by the Fifth Circuit in *Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir.1982).

Finally, General Dynamics and the Navy contend that even if the Court does not defer to the Navy's conclusions, considerations of public policy demand that mere approval by the government of a contractor's design be sufficient to preclude recovery by the plaintiffs. As is discussed more fully later, this Court is not persuaded that mere approval from a public policy standpoint is sufficient to preclude recovery.

D. THE GOVERNMENT CONTRACTOR'S DEFENSE

General Dynamics contends that the government contractor's defense shields General Dynamics from any liability to the Plaintiffs in negligence. This Court disagrees.

The Law

The burden of proof regarding the availability of the government contractor's defense rests with General Dy-

namics. *McKay v. Rockwell International Corp.*, 704 F.2d 444, 451 (9th Cir.1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). General Dynamics must prove each element of the defense by preponderance of the evidence. *Id.* at 453.

In *Bynum*, the Fifth Circuit recognized the government contractor's defense as a matter of federal common law. To establish the government contractor's defense, a military contractor must:

1. First, demonstrate that the government is immune from liability under the *Feres/Stencel* Doctrine . . .
2. Second, the military contractor must prove that the government established reasonably precise specifications for the allegedly defective military equipment
3. and that the equipment conformed to those specifications . . .
4. Finally, it must be shown that the military contractor warned the government about errors in the government specifications or in dangers involved in the case of the equipment that were known to the contractor but not known to the government.

Id. at 574.

The Fifth Circuit's four-prong test conforms to the trend in the law on the government contractor's defense as represented by the Third Circuit's decisions in *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3rd Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985) and *In Re Air Crash Disaster at Mannheim, Germany*, 769 F.2d 115 (3rd Cir.1985); the Seventh Circuit's holding in *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir.1985); the Ninth Circuit's decision in *McKay v. Rockwell International Corp.*, 704 F.2d 444

(9th Cir.1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984) and the Eleventh Circuit's decision in *Burgess v. Colorado Serum Co.*, 772 F.2d 844 (11th Cir.1985).

In the instant case, General Dynamics has failed to establish by a preponderance of the evidence that the government contractor's defense applies. Although General Dynamics has demonstrated that the government is immune from suit under the *Feres/Stencel* doctrine, meeting the first prong, it cannot meet the second prong because it was General Dynamics and not the Navy, who ultimately "established reasonably precise specifications" for the diving system. *Bynum*, 770 F.2d at 574. Given this finding, the third prong of *Bynum* is not even implicated. As to the final prong, General Dynamics failed not only to warn of the danger of a partial vacuum but also failed to warn of design deficiencies in the Navy's general requirements. Each prong is discussed in turn below.

The Law Applied

1. The first requirement of the government contractor's defense is the presence of *Feres/Stencel* immunity on the part of the government. *Feres/Stencel* immunity requires that a Plaintiff's complaint arise from an injury to a serviceman in the course of activity incident to military service. *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2058; *Feres*, 340 U.S. at 146, 71 S.Ct. at 159. In this case, Plaintiff's complaint arises from the death of servicemen caused by a partial vacuum in the submarine starboard hangar diving chamber which the servicemen were in incident to their service in the United States Navy. This case, thus, falls squarely within the protective shield created by *Feres/Stencel* doctrine. Accordingly, the government is immune from liability to the Plaintiffs.

2. The second element of the government contractor's defense, as the Ninth Circuit formulated the defense in

McKay, 704 F.2d at 451, is establishment or approval by the United States government of reasonably precise specifications for the allegedly defective product. In this case, General Dynamics contends that the Navy established the specifications for the diving chamber by either preparing them itself or by reviewing in detail and approving those prepared by General Dynamics employees. For the reasons discussed below, this Court does not agree that the Navy established these specifications or approved them.

a. The Establishment Question

Under *Bynum*, it is clear that when the product is "manufactured in accordance with precise design specifications furnished by the . . . government," the second prong of the government contractor's defense is satisfied. *Id.* at 574 n. 23. *Bynum*, however, did not address the "extent to which the government must participate in generating the design specifications of the military equipment before the government contractor's defense would be applicable," which is directly at issue in this case. *Id.*

The contracts involved here left design entirely to the discretion of General Dynamics. The Navy set only general performance standards leaving the details to General Dynamics. Specifically, the United States provided General Dynamics with mere skeletal guidelines embodied in the COR and schematic line drawings. *See* Plaintiff's Ex. 38 & 39. However, less than two pages of the COR refer to the conversion of the diving hangar while the line drawings consist of only a one page diagram of the flood and drain system. These general guidelines did not specify the precise location of the main hangar vent valve and were silent on the existence of vacuum gauges, indicator lights, or safety interlocks for the main hangar flood and drain system. The evidence shows that such determinations were left to the discre-

tion and expertise of the General Dynamics designers assigned to prepare the working drawings.

The Court credits the testimony of Mr. Bill Milwee, the Plaintiff's expert, and is persuaded that General Dynamics' designers had to use a great deal of expertise and discretion in converting the information provided by the Navy into working drawings. *See* Plaintiff's Ex. 5-10. The Court is also persuaded by the testimony of Mr. Urbani and Mr. Reall, both General Dynamics employees, and finds that because the system diagrams were not very detailed, General Dynamics had to use their own specialized knowledge in converting the diagrams into working drawings. *See* Urbani depo. p. 18; *Reall* depo. p. 31, l. 6-10.

With this sparse information, General Dynamics produced 71 pages of highly detailed working drawings for the starboard hangar diving system. Under such circumstances, where "only minimal or very general requirements are set for the contractor by the United States" it cannot be seriously maintained by General Dynamics that it was the government and not General Dynamics who "established reasonably precise specifications." *McKay*, 704 F.2d at 450; *cf. Price v. Tempo, Inc.*, 603 F. Supp. 1359, 1363 (E.D.Pa. 1985). Simply concluding, however, that these plans were reasonably detailed specifications of General Dynamics does not dispose of the second prong of the government contractor's defense since the trend in the law is to interpret the phrase "established by the government" as including the situation where the government, after having conducted a detailed review, approves drawings and specifications on which the contractor assisted.

b. The Approval Question

From a factual standpoint, the level of review here was not sufficient to constitute "approval". *Koutsoubous* and *Mannheim* definitively analyzed this standard of

proof. In *Koutsoubous*, a helicopter manufactured by Boeing Vertol crashed causing the deaths of several Navy pilots. In granting Boeing's motion for summary judgment on the government contractor's defense, the District Court concluded that the Navy had established the specifications by approving them after a substantial review and that Boeing had complied with the specifications. *See Koutsoubous*, Memorandum Decision p. 7A, note 4, Dec. 22, 1982.

In affirming the District Court, the Third Circuit concluded that "government approval of the specifications" means the process by which the government "examines and agrees to a detailed description of the workings of the system." *Koutsoubous* 755 F.2d at 355. In *Koutsoubous*, the Third Circuit noted that the District Court found a "continuous back and forth relationship between Boeing and the Navy with the Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to the specifications." *Id.*

Five months later, the Third Circuit in *Mannheim* reaffirmed *Koutsoubous* on the "approval" standard. In *Mannheim*, forty-six persons were killed when a helicopter manufactured by Boeing crashed. The Third Circuit, stated:

> The government contractor defense is available to a contractor that participates in the design of the product, so long as the government's approval consists of more than a mere rubber stamp. The defense is available so long as there is *true government participation* in the design.

769 F.2d at 122 (emphasis added). The Third Circuit then ordered the District Court to enter judgment for Boeing on the basis of the government contractor's defense.

If approval of the design of military hardware by examining agreeing to a detailed description of the work-

ing drawings of the system is sufficient to satisfy the requirements of the government contractor's defense, then there was no such "approval" under the facts of the case. Although the government's review did involve some subjective evaluation of the contents of the plans, the level of examination did not equate to the amount of engineering expertise required by General Dynamics to prepare the plans. Therefore, this Court concludes that "true government participation in the design" necessary to constitute approval was lacking. *Mannhein*, 769 F.2d at 122.

Under *Bynum's* balancing test, General Dynamics' level of participation in the design so outweighed the government's level of participation that it was General Dynamics, who was ultimately responsible for the "reasonably precise specifications" involved here. *Id.* at 574. In the real world, although the government and the contractor may jointly work together in producing specifications, the level of participation always varies. Sometimes the government's participation is minimal at best. That is the very case here.

Given the disparity in the level of expertise between the Navy and General Dynamics and the "imbalance of knowledge" about the safety deficiencies in the design at the time General Dynamics' specifications were approved, it cannot be seriously argued that the Navy engaged in any "substantial review of the specifications." *Mannheim*, 769 F.2d at 123; *See Also Shaw v. Grumman Aerospace Corp.*, 593 F.Supp. 1066, 1074 (S.D.Fla. 1984).

The most telling evidence of the limited review which the work of General Dynamics' designers and engineers received is Plaintiff's Exhibit 28. This exhibit is a memo prepared by Paul Lawrence to his superiors at Mare Island Naval Shipyard which discusses the history of the GRAYBACK design. Mr. Lawrence was the section leader of the group which prepared the hangar flood and

drain system drawings. On page 4, paragraph (e), Mr. Lawrence stated, "Most of the GRAYBACK design work was accomplished by farmed-in contractor personnel and not checked by Mare Island experienced technical people."

General Dynamics was hired for the expertise and the experience it possessed. The government neither possessed the qualifications nor the ability to engage in any substantial review of General Dynamics' specification. Moreover, the design decisions, material to the defects alleged, required no military expertise, therefore, there is no justification for insulating General Dynamics from liability where the government merely approves of the decision. "In any case, mere Navy approval of the detailed design specifications and drawings developed by General Dynamics does not make the government contractor's defense available to it." *Shaw*, 593 F.Supp. at 1074. If it did then under *Koutsoubous* and *Mannheim*, the government contractor's defense would seem always to apply and contractors would never be liable for a defective product because the government would always be in the position to approve a contractor design. The government's approval in this case is no different from the approval of any product or design prepared for the government. If that type of approval is sufficient to satisfy the second prong, then there would never be a recovery under any circumstances against defense contractors. Where the government has only given mere approval, *Bynum* does not contemplate no recovery under any circumstances against defense contractors. *Id.* at 574 n.23.

3. The third element of the defense is compliance with the government's specifications. This prong is not implicated in this case because it was General Dynamics and not the government who established "reasonably precise specifications" for the defective design. This Court notes, however, that the system is designed by General Dynamics *did not even* conform to the general requirements provided by the government. Specifically,

the COR required that the main hangar vent valve be "controllable from the air bubble and the berthing space." *See* Plaintiff's Ex. 28, p. 223, l. 95. The design of the system by General Dynamics did not conform to this requirement. The working drawings of the system prepared by General Dynamics shows the main hangar vent valve located on the vent pipe at a 45 degree angle. *See* Plaintiff's Ex. 6. The testimony of the witnesses in this case forces the conclusion that the General Dynamics designer intended that the valve control handle be located outside the control bubble and berthing space, despite the government's instructions to the contrary. This is where, in fact, the valve was located at the time of the accident.

4. Finally, to satisfy the fourth and final prong of the government contractor's defense, General Dynamics has the burden to prove that it "warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the contractor but not to the United States." *Bynum*, 770 at 574. The fact that there was no warning is undisputed.

The Navy hired General Dynamics specifically because it had specialized knowledge of submarine design. General Dynamics assumed the responsibility of advising and warning the Navy on the safety aspects of the systems that General Dynamics was designing. *See* Plaintiff's Ex. 30. Both the Navy and General Dynamics knew or should have known of the dangers associated with the system's potential to create a partial vacuum absent basic safety features. The creation of a vacuum and its effect on humans is a fundamental engineering principle deserving no further comment. If either General Dynamics or the Navy had paid sufficient attention to the COR or the working drawings or had engaged in any quality assurance or operational testing procedures, the problem of a partial vacuum would have been obvious. General Dy-

namics, howecer, failed to warn the Navy about patent errors in the government's general requirements or their own working drawings.

Specifically, General Dynamics did not warn the Navy of its failure in the general requirements to provide for basic safety features such as: 1) safety interlocks, 2) vacuum gauges, or 3) vent valve open/close indicator lights. In the final analysis, although the Navy's failure to perform sufficient operational testing or to conduct a formal design review before putting the system into operation constitutes negligence as it would have discovered the system's potential to create a partial vacuum, it does not dismiss the fact that the obligation to perform the technical research necessary for the design conversion of the GRAYBACK and to identify any hazards fell fully on the shoulders of General Dynamics. *See* Plaintiff's Ex. 1-3. Thus, General Dynamics has failed to satisfy the fourth prong of the defense.

In summary, General Dynamics has only established the first prong of the four-part test. Thus, the government contractor's defense does not apply. "Federal law provides no defense to the military contractor that mismanufactures military equipment or that it is itself ultimately reasonably for the design defect." *Bynum*, 770 F.2d at 574. In this case, General Dynamics, rather than the government, was ultimately responsible for the design defects in the driving hangar aboard the GRAYBACK which were the proximate cause of the accident in question. Thus, General Dynamics is not entitled to stand under the umbrella of sovereign immunity with the government and must be held accountable for its negligent acts and omissions.

E. THE BORROWED SERVANT DOCTRINE

General Dynamics next argues that even if the Court concludes that the government contractor's defense does not apply, General Dynamics cannot be found liable to the Plaintiffs for the injuries they sustained as a matter

of law because the employees involved in the GRAYBACK conversion were not acting as General Dynamics employees, but instead were borrowed servants of the government. This Court disagrees.

The Law

In the Fifth Circuit, the test of whether or not a person is a borrowed servant is factual. *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 376 (5th Cir. 1985); *Ruiz v. Shell Oil Company*, 413 F.2d 310, 312-13 (5th Cir. 1969). "The central question involving servant cases is whether someone has the power and control to direct another person in the performance of his work". *Hebron v. Union Oil Company of California*, 634 F.2d, 245, 247 (5th Cir. 1981). The test to determine whether a borrowed servant relationship exists requires consideration of a variety of factors, none of which is conclusive or decisive. *See Ruiz v. Shell Oil Company*, 413 F.2d, 310 (5th Cir. 1969).

The Law Applied

1. It is legally impermissible for the government to contract non-governmental employees who are merely to receive their assignments from government personnel because this is a violation of the Civil Service laws. *See* 5 U.S.C. § 3109. However, even though the master/servant relationship was proscribed, the Court may still find that such a relationship did, in fact, exist between Mare Island Naval shipyards and the General Dynamics employees. Under the facts of this case, however, the Court cannot do so.

2. The United States Navy hired General Dynamics specifically because its employees were experienced and would not need supervision. Although there was cooperation between the Navy personnel and General Dynamics personnel, the Navy did not intend to control or supervise the particulars or actual details of General Dynamics employees' work. General Dynamics was hired without any competitive bidding specifically because Gen-

eral Dynamics had specialized knowledge in submarine piping design and would, therefore, not need close supervision in performing the discretionary design work. In determining whether an employee is a borrowed servant, cooperation between the employee and the alleged borrowing employer, as distinguished from subordination, is not enough to create an employment relationship. *See Standard Oil Company v. Anderson*, 212 U.S. 215, 226, 29 S.Ct. 252, 256, 53 L.Ed. 480 (1909).

3. The contracts themselves evidence the intention not to create a borrowed servant relationship. If the parties to the contracts had intended the General Dynamics designers and engineers to be borrowed servants of the Navy, and to work under government scrutiny with their tasks chosen at the whim of the Navy depending upon day-to-day needs, there would have been no need to define what work needed to be performed or to describe the scope of the work. However, in all three contracts the responsibilities of General Dynamics is set out with great specificity. *See* Plaintiff's Ex. 1, Sec. 2.1.4 of Contract No. 0221, Plaintiff's Ex. 2 of Contract No. 1212, and Plaintiff's Ex. 3, Sec. 1.4 of Contract No. 1832; *See Also* Plaintiffs' Ex. 1, Sec. 2.7.2. If the parties to these contracts had intended that General Dynamics' designers would receive their instructions on a day-to-day basis from Mare Island supervisors, there would have been no need to describe General Dynamics' specific areas of responisibility in the agreement.

4. General Dynamics maintained its employer/employer relationship and retained the obligation to pay General Dynamics employees. The General Dynamics employees assigned to the GRAYBACK conversion at Mere Island did not acquiesce to becoming government employees. The Court is persuaded by Mr. Reall's testimony and concludes that he considered himself a General Dynamics' employee at all times. *See* Reall depo. at p. 261, l. 16-18. Nor did General Dynamics terminate its rela-

tionship with its employees. General Dynamics maintained an administrative structure which was headed by Mr. Conway Davis, the General Dynamics supervisor at Mare Island, whose second in command was Mr. Robert Urbani. The travel arrangements, housing, personnel problems and pay all were the concern of General Dynamics, not that of the Navy. Also, while at Mare Island, both Mr. Conway Davis and Mr. Robert Reall received their pay, from General Dynamics, not from the Navy.

Given these facts, the Court concludes that General Dynamics was an independent contractor given discretionary, independent decision-making authority and, therefore, its employees were not borrowed servants of the government.

F. THE PRECONDITION TO THE GOVERNMENT'S LIABILITY

The contracts between General Dynamics and the United States contain preconditions for indemnity set forth in Standard Clause 21, entitled Insurance Liability to Third Persons. This clause provides at (c) that the contractor shall be reimbursed "for liability to third persons . . . for death or bodily injury," which are "not compensated by insurance or otherwise . . . *provided* such liability is represented by final judgments." (Emphasis in original). Absent stipulation of the parties, this Court will conduct an evidentiary hearing in order to make findings as to whether or not General Dynamics has met the contractual prerequisite for the claimed indemnity.

G. DAMAGES

The Court is persuaded that each party's evaluation of damages incurred in this case is not significantly different. Therefore, the Court extends a period of 30 days to the parties to confer in order to reach a stipulation or to make a joint recommendation as to what the award

of damages should be. The Court, of course, expects none of the parties to waive any of their possible defenses or rights by engaging in this process of negotiation.

H. A RECENT DECISION

One of the primary issues in this case is the application of the government contractor's defense. Subsequent to the time this order was prepared but prior to filing, the Eleventh Circuit handed down it's decision in *Shaw v. Grumman*, 778 F.2d 736 (11th Cir.1985) addressing this very issue. The threshold question before the Court, according to Judge Johnson, was whether the United States had actually made an informed decision to use a particular military product despite knowledge of the inherent risks. In affirming the District Court's judgment for the Plaintiff, Judge Johnson concluded that "although the Navy did formally approve Grumman . . . [Aerospace Corporation's] specifications and design changes, that approval did not constitute the sort of informed military decision to accept the risk of dangerous product to which this Court must defer under separation of powers doctrine." *Id.* at 747.

Although the Eleventh Circuit test is different from the test set forth in the *Bynum* decision, it is reasonably calculated to produce the same result: to place liability upon the party ultimately responsible for the defect. Nothing in the Judge Johnson decision is inconsistent with what has been done in this case. Here, no such informed decision was made by the United States Navy when it employed the General Dynamics' design of the hangar, flood, and drain system on board the USS GRAYBACK. Liability has been fairly placed upon the party "ultimately responsible for the design defect." *Bynum*, 770 F.2d at 574.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 86-2965 and
87-2175

D. C. Docket No. CA-B-83-573

GLORIA TREVINO, *et al.*,
Plaintiffs-Appellees,
v.

GENERAL DYNAMICS CORP.,
Defendant-Appellant.

GLORIA TREVINO, *et al.*,
Plaintiffs,
v.

GENERAL DYNAMICS CORP.,
Defendant-Cross Claim
Plaintiff-Appellant,
v.

UNITED STATES OF AMERICA,
Defendant-Cross Claim
Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court for plaintiffs against General Dynamics in this cause is affirmed; and the judgment on the cross-claim by General Dynamics, seeking contractual indemnity from the United States, is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that General Dynamics Corporation pay to plaintiffs-appellees and defendant cross claim defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

February 23, 1989

Issued as Mandate: July 6, 1989 OP-JDT-11

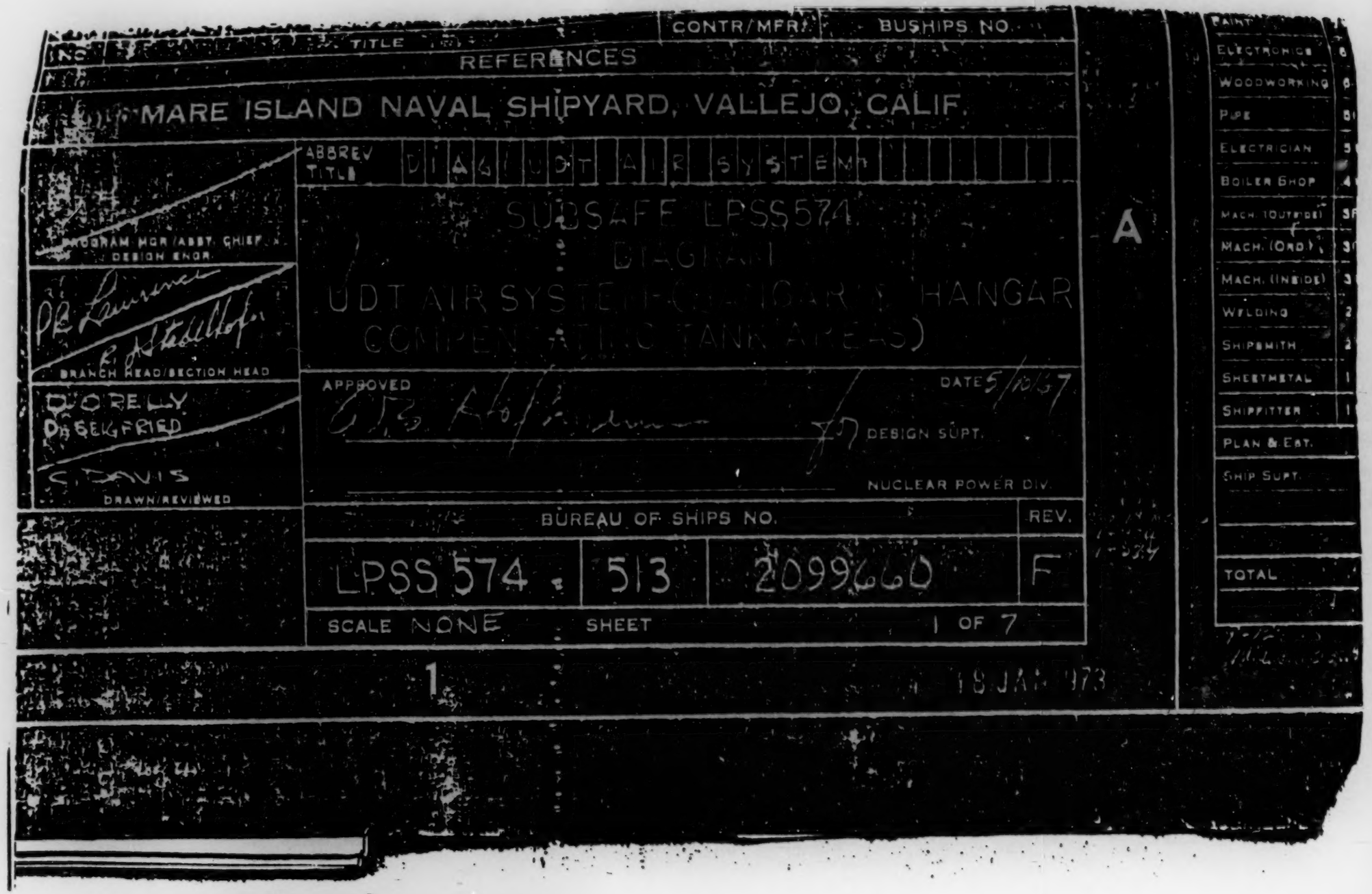
A true copy

Test:

Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Karen L. Comeaux

KAREN L. COMEAUX
Deputy
New Orleans, Louisiana
July 6, 1989



89-376 (2)

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, DONALD and EMILY BLOOMER, MAUREEN DENISHA BOND, ROBERT and ROSE FITZ, and ESTHER B. SHELTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WAYNE FISHER
Counsel of Record

DAVID W. HOLMAN
MICHAEL J. MALONEY

FISHER, GALLAGHER, PERRIN & LEWIS
70th Floor
First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002
(713) 654-4433

Attorneys for Respondents

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

42 pp

QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

1. Whether the Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that the "approval" element of the government contractor defense requires proof that a government official performed a policy level "substantive review and evaluation" constituting a discretionary act under the Federal Tort Claims Act.

2. Whether the Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that General Dynamics failed to prove the "approval" element of the government contractor defense despite undisputed facts that the government was fully aware of the alleged defects in the product yet chose to use it as designed for thirteen years.

3. Whether the holding by the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) that government approval under the government contractor defense can occur only during the design stage, conflicts with the Fourth Circuit's post-*Boyle* decision in *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989) and the several federal circuit court decisions prior to *Boyle* that approval can occur after the design stage where the government subsequently discovers the defects yet chooses to use the product as designed.

QUESTIONS PRESENTED FOR REVIEW BY RESPONDENT

1. Whether the final element of the government contractor defense can be satisfied absent proof that the government had "actual knowledge" of the dangers in the design that were known to the private design contractor.

LIST OF PARTIES

Respondents/Appellees/Plaintiffs

- Gloria Trevino Parker, formerly Gloria Trevino, who was the wife of Charles W. Bloomer at the time of his death on January 16, 1982.
- Corinna A. Bloomer and Lliana A. Bloomer, children of Gloria Trevino and Charles W. Bloomer.
- Donald and Emily Bloomer, parents of Charles W. Bloomer.
- Maureen Denisha Bond, who was the wife of Richard David Bond at the time of his death on January 16, 1982.
- Richard Bond, Jr., child of Maureen Denisha Bond and Richard David Bond.
- Robert and Rose Fitz, parents of Rodney Lee Fitz who died on January 16, 1982.
- Esther B. Shelton, mother of Leslie Crawford Shelton who died on January 16, 1982.

Petitioner/Appellant/Defendant

- General Dynamics Corporation.

Appellee/Cross-Defendant

- United States of America.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the families of four deceased Navy divers —Charles W. Bloomer, Rodney Lee Fitz, Leslie Crawford Shelton, and Richard David Bond—submit this brief in support of their request that certiorari be denied.

STATEMENT OF THE CASE

Respondents believe that the Petitioner's statement contains inaccuracies or omissions. *See* Sup. Ct. R. 34.2. Respondents offer these clarifications.

1. *The Cause of the Accident.* General Dynamics implies that the cause of the accident was Mr. Bloomer's failure to completely open the ventilation valve. The district court found that General Dynamics' negligence in design and warning caused the vacuum that killed the divers. *Trevino v. General Dynamics,* 626 F. Supp. 1330, 1333 (E.D. Tex. 1986). On appeal, General Dynamics did not challenge the finding that the design was defective. *Trevino v. General Dynamics,* 865 F.2d 1474, 1478 (5th Cir. 1989).

2. *General Dynamics' Status as Designer.* General Dynamics implies that its employees merely "assisted" the Navy in the design of the diving chamber. The record reveals that General Dynamics entered into a series of contracts with the Navy to do all the "engineering effort for the preparation of working drawings." (Pl. Ex. 1, 2); *Trevino,* 626 F. Supp. at 1332. In these contracts, General Dynamics assumed "full responsibility for all technical research," responsibility to review the work for compliance with general requirements, and responsibility "for all quality assurance actions pertaining to the design product . . . including inspection of the end product item before issue." *Id.* Conway Davis, General Dynamics' supervisor at the site, testified that the working drawings at issue were done "one hundred percent by my people" and that the design work was offered to the Navy as a General Dynamics product. (Tr. 711, 712). The working design drawings used for construction of the diving

chamber were affixed with a stamp that read "Initial Issue Of This Plan Developed And Prepared By GEN DYN CORP/E.B. DIV" and signed by three General Dynamics designers. (Pl. Ex. 5, 6, 7, 8, 9, 10). There is a great deal of other evidence and testimony in the record that also reveals that General Dynamics was solely responsible for the defective design that killed the divers. (Pl. Ex. 27, 28, 142; Tr. 134, 194, 210, 215, 232, 233, 234, 259, 272, 274, 291, 298, 303, 305, 306, 309, 312, 338, 343, 392, 414, 470, 475, 510, 511, 707, 711, 712, 723, 728, 745, 746, 747, 748, 750, 758, 761, 831, 832, 838, 842, 986, 994, 1012, 1013, 1014).

3. *The Navy's Specifications.* By omission of language in the lower court opinion, General Dynamics implies that the Navy issued a 339-page circular of requirements (COR) that described the design concept for the diving chamber. The COR represented the requirements for the entire conversion of the GRAYBACK, and only two pages of the COR were devoted to the diving chamber. (Pl. Ex. 38, 39); *Trevino,* 865 F.2d at 1476. These instructions were mere "general performance standards" which left design discretion entirely to General Dynamics. *Id.* at 1486. From these general instructions, General Dynamics produced 71 pages of detailed working drawings. *Id.* at 1477.

4. *The Navy "Approval."* General Dynamics implies that the Navy "approved" the working drawings. Although signatures of Navy personnel appear on the drawings, the evidence revealed that the design was not reviewed. Significantly, a Naval memorandum written in 1969 (13 years before the accident) by Paul Lawrence, the Navy section leader in charge of the hangar flood and drain system design, stated:

> Most of the GRAYBACK design work was accomplished by farm-in contractor personnel and not checked by Mare Island experienced technical people.

(Pl. Ex. 28; Tr. 410); *Trevino,* 865 F.2d at 1486; *see* Appendix A. Further, the final design was never sent to NAVSEA (Naval Sea Systems Command) for approval as required by the COR. (Pl. Ex. 156, p. 78).

5. *The Navy Sea Trials and Subsequent Use*: General Dynamics implies that through sea trials and subsequent use, the Navy approved the design features in question. Although the Navy found that, on occasion, the ventilation valve was difficult to turn, that did not alert the Navy to the specific design defects found to have caused the vacuum that killed the men. Admiral Fowler, commander of NAVSEA, and John Percell, the Naval engineer responsible for certification of the GRAYBACK diving system, each reported that no design review of the GRAYBACK diving system had ever been performed. (Pl. Ex. 41A, 153; Tr. 911); *see* Appendix B.

REASONS FOR DENIAL OF WRIT

I. CERTIORARI SHOULD BE DENIED SINCE THERE EXISTS NO CONFLICT AMONG COURTS OF APPEALS ON THE ISSUES PRESENTED.

On June 27, 1988, a little over a year ago, this Court issued its opinion in *Boyle v. United Technologies,* 108 S. Ct. 2510 (1988). In that 5-4 decision, authored by Mr. Justice Scalia, the Court first recognized the government contractor defense—a defense that arises from federal common law. *Id.* at 2514, 2518. The Court held that a private contractor is only entitled to the defense if it

can prove (1) that "the United States approved reasonably precise specifications"; (2) that "the equipment conformed to those specifications"; and (3) that "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 2518. General Dynamics contends that the lower court's application of the first element is at issue here.

An analysis of the lower court opinions after *Boyle* reveals that there is no conflict and that the issues raised are not ripe for review. Since the *Boyle* opinion, only three federal courts of appeals have addressed the government contractor defense.

The Fifth Circuit addressed the defense in the opinion below and in three other opinions. *See Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989); *Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989); *McGonigal v. Gearhart Industries, Inc.*, 851 F.2d 774 (5th Cir. 1988). Of course, any conflict in those opinions would be considered an "intramural matter" for the Fifth Circuit and would not warrant this Court's review. Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Assn. 541, 552 (1958). In its petition for rehearing en banc, General Dynamics contended that a conflict existed among *Trevino* and *Smith* and *Garner*. The Fifth Circuit judges, by an 11-4 vote, rejected that contention and denied en banc review. *Trevino v. General Dynamics*, 876 F.2d 1154 (5th Cir. 1989).

The Eleventh Circuit recently addressed the defense in *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989). That opinion cited *Trevino* and applied *Trevino* to the facts there presented. *Id.* at 1320. General

Dynamics does not maintain here that *Trevino* and *Harduvel* are in conflict.

The only other appellate court to address the defense is the Ninth Circuit. *Ramey v. Martin-Baker Aircraft Co., Ltd.,* 874 F.2d 946 (4th Cir. 1989). Although that opinion was issued after *Trevino,* the Ninth Circuit did not cite *Trevino,* the Ninth Circuit did not seek to distinguish *Trevino,* and the Ninth Circuit did not recognize any conflict with *Trevino.*

Thus, there is no direct conflict with *Trevino.* There is also no implied conflict. Each case turned on its own facts and applied those facts to the elements of the defense.

General Dynamics attempts to manufacture a conflict through its contention that *Ramey* held that "approval can occur after the design stage" while *Trevino* held that "approval can occur only during the design stage." *See* Questions Presented by Petitioner (3).

Trevino did *not* hold that approval can occur only at the design stage! As the language of the opinion itself reveals, the Fifth Circuit evaluated the very facts that General Dynamics maintains were not considered. *Trevino,* 865 F.2d at 1487 n.13. After a review of the facts that related to the Navy's conduct after the design stage, the Fifth Circuit held:

> The Navy had control over the product and had every opportunity to exercise discretion over the design. This the Navy did not do. Both the Navy investigation and the district court faulted the Navy for its *failure* to exercise discretion over the design.

Id. (emphasis in original). Thus, there is no "real and embarrassing conflict of opinion and authority between

the circuit courts of appeal" to warrant this Court's review. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951); Sup. Ct. R. 17.1.

Moreover, it is evident that these issues are not ripe for this Court's review. Mr. Justice Brennan has noted a policy of the Court not to grant review "until more than two courts of appeal have considered a question." Mr. Justice Brennan, *Some Thoughts on The Supreme Court's Workload,* 66 Judicature 230, 233 (Dec.-Jan. 1983).

This policy has marked significance to the issues presented here. *Boyle* created a brand new defense under the federal common law. *Boyle,* 108 S. Ct. at 2514. This Court long ago held that "flexibility and capacity for growth and adaption is the peculiar boast and excellence of the common law." *Hurtado v. California,* 110 U.S. 517, 530 (1884). To revisit the defense, at a time when the circuit courts have barely had an opportunity to consider it, would stifle the growth of the common law.

And, as Mr. Justice Stevens recognized, further consideration by the lower courts will enable this Court to deal with the issues "more wisely at a later date." *McCray v. New York,* 461 U.S. 961, 962 (1983) (Stevens, J., joined by Blackmun, J. & Powell, J.—explanation of denial of certiorari). "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917-18 (1950) (Frankfurter, J.).

Thus, because there is no conflict among the courts of appeals and because the issues are not ripe for review, this Court should deny certiorari.

II. CERTIORARI SHOULD BE DENIED SINCE THERE EXISTS NO CONFLICT BETWEEN *TREVINO* AND *BOYLE*.

As Respondents understand Petitioner's argument, *Trevino* is alleged to conflict with *Boyle* because *Trevino* analyzed the first element of the government contractor defense—approval of reasonably precise specifications—under the discretionary function exception to the Federal Torts Claims Act. *See* 28 U.S.C. § 2680(a).

This analysis does not present a conflict because such was *exactly* the analysis counseled by *Boyle*. In *Boyle*, this Court rejected the *Feres/Stencel* rationale (which had been used by the lower courts in formulation of the defense), and the Court adopted a rationale for the defense based on the discretionary function exception. *Boyle*, 108 S. Ct. at 2517. Specifically, the Court held that the "approval" element assures "that the suit is within the area where the 'discretionary function' would be frustrated . . ." *Id.* at 2518.

The petitioner then attacks *Trevino* because, under the discretionary function analysis, the approval element would require proof of a "policy judgment." It is important to note that this Court used the very same term in rejection of the *Shaw* test. *Boyle*, 108 S. Ct. at 2518. *Shaw* would have required only minimal contractor participation in the design. *Id.* This Court noted that such a rule was not designed "to protect the federal interest embodied in the discretionary function exception." *Id.* The Court in *Boyle* further explained that "[t]he design selected may well reflect a *significant policy judgment* by Government officials whether or not the contractor rather than those officials developed the design." *Id.* (emphasis added).

Here, General Dynamics developed the design and there was no evidence that the government exercised any discretion over the design. The fact that the government knew that the ventilation valve was difficult to turn does not trigger government discretion. *Boyle* requires "that the *design feature in question* be considered by a Government officer, and not merely by the contractor itself." *Id.* (emphasis added).

Under the facts of this case, no government officer considered the design features in question—the design defects that led to the deaths of the four Navy divers. The General Dynamics design was not checked by Naval personnel and no design review of the diving chamber in the GRAYBACK was ever conducted, either during the creation of the design or during the years that preceded the accident. (Pl. Ex. 28, 41A, 153, 156; Tr. 407, 411, 911).

The primary focus of *Trevino* is that "approval" under *Boyle* "requires more than a rubber stamp." *Trevino,* 865 F.2d at 1480. General Dynamics now agrees with that principle, as have all courts that have considered the issue. *See, e.g., Tozer v. LTV Corp.,* 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied,* 108 S. Ct. 2897 (1988); *Schoenborn v. Boeing,* 769 F.2d 115, 122 (3rd Cir. 1985), *cert. denied sub nom, Eschler v. Boeing Co.,* 465 U.S. 1067 (1985).

However, General Dynamics does not suggest how that "something more" is to be determined, if not by application of the discretionary function exception. It is instructive to note that the lower courts prior to *Trevino,* though based on the *Feres/Stencel* rationale, used much the same language as *Trevino* in explanation of the type

of government approval required. *See, e.g., Boyle v. United Technologies Corp.,* 792 F.2d 413, 414 (4th Cir. 1986) ("reviewed . . . and approved the design"), *vacated and remanded,* 108 S. Ct. 2510 (1988); *Tozer v. LTV Corp.,* 792 F.2d 403, 408 (4th Cir. 1986) ("if there is *genuine* governmental participation in the design, the defense is available"); *Koutsoubus v. Boeing Vertol,* 755 F.2d 352, 355 (3rd Cir. 1985) ("sufficient government participation"), *cert. denied,* 474 U.S. 821 (1985); *Shoenborn v. Boeing,* 769 F.2d 115, 122 (3rd Cir. 1985) ("true government participation in the design"; defense available "so long as government has approved the design after a *substantial review* of the specification").

Finally, the Petitioner attacks *Trevino* for "importing into the government contractor defense the body of law interpreting the discretionary function exception." *See* Petition at 8, 12-18. Petitioner complains that there is "extraordinary tension among the federal circuits regarding the parameters of the discretionary function exception." *See* Petition at 8, n.4. Apparently, the Petitioner wants this Court, in one fell swoop, to resolve all conflicts on the discretionary function exception as well as the imagined conflicts on the government contractor defense.

In any case, it was *Boyle,* and not *Trevino,* that "imported" the discretionary function exception into the government contractor defense. *Boyle,* 108 S. Ct. at 2517. This Court was well aware at the time that it based the defense on the discretionary function exception that the cases that interpreted the exception were imprecise. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 813 (1984) ("unnecessary—and indeed impossible—to define with

precision every contour of the discretionary function exception"). Yet the Court chose the discretionary function exception as the rationale in *Boyle* to balance the competing interests.

Prior to *Boyle,* many commentators expected the Court to eliminate all uncertainty that surrounded the application of the defense. *See, e.g.,* R. Craft, J. McCarthy & D. Mitzenmacher, *The Government Contractor Defense: A Fair Defense or the Contractor's Shield?* 91 (J. Madole ed. 1986). Instead, this Court only addressed the contours of the defense and left the specific analysis to be resolved by the lower courts. *See Boyle,* 108 S. Ct. at 2518. This Court cannot grant review each time a lower court interprets another aspect of the defense.

The *Trevino* analysis is in harmony with the views of the commentators who have discussed *Boyle. See, e.g.,* Comment, *Boyle v. United Technologies Corp.: A Questionable Expansion of the Government Contract Defense,* 23 Georgia L. Rev. 227, 251-52 (1988) ("it may be assumed that the defense will in the future be defined by its underlying rationale of discretionary immunity"). The *Trevino* analysis is in harmony with the views of the Eleventh Circuit. *Harduvel v. General Dynamics,* 878 F.2d 1311, 1315 (11th Cir. 1989) ("discretionary approval"). And, the *Trevino* analysis is in harmony with the views of this Court. *Boyle,* 108 S. Ct. at 2518 ("the discretionary decision").

The Fifth Circuit, in a scholarly and insightful opinion authored by Judge Reavley, and joined by Judges Higginbotham and Smith, followed both the letter and the spirit of *Boyle.* There is no conflict with *Boyle* and, for that reason, certiorari should be denied.

III. CERTIORARI SHOULD BE DENIED SINCE THERE EXIST NO "SPECIAL AND IMPORTANT" REASONS TO GRANT REVIEW.

This Court only grants review to consider "issues of federal law important to the country . . ." Mr. Justice Brennan, *Some Thoughts on the Supreme Court's Workload,* 66 Judicature 230, 231 (Dec.-Jan. 1983). Here, there are no "special and important reasons" to grant review. Sup. Ct. R. 17.1.

First, the questions presented by the Petitioner do not present sufficient grounds for review. The questions only ask the Court to decide whether there is a conflict. As the leading commentators on this Court's practice note,

> A question whether the decision below is important or is in conflict with some other lower court decision may relate to the reasons for granting the writ, but it is not a question for decision by the Court. The question to put to the Court must concern the substantive issue as to which ruling on the merits is sought.

R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* § 6.25 at 362 (6th ed. 1986). Here, the Petitioner has not presented a single substantive question for review. Of course, "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Sup. Ct. R. 21.1(a).

Second, it is apparent that to resolve the issues presented, this Court will be forced to reexamine the record. As the Court said in *Boyle,* "whether the facts established the conditions for the defense is a question for the jury." *Boyle,* 108 S. Ct. at 2519. Here, General Dynamics asks this Court to make a third review of the lengthy trial

record to find what the lower courts were unable to find —that the government exercised discretion over the design features in question.

This Court has ruled that such fact canvassing is not to be served by a grant of certiorari: "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Moreover, since this Court sits as a court of law, the Court "cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

The Fifth Circuit in this case correctly applied the *Boyle* principles to the facts. The *Boyle* defense is applied on a case-by-case basis, and the facts are of importance only to the litigants. Thus, there is an insufficient basis for this Court's review. *See Rudolph v. United States*, 370 U.S. 269, 270 (1962).

Finally, the policies asserted by the Petitioner are not implicated here. General Dynamics claims that to impose liability upon it would result in second-guessing of military judgments and in increased costs to the government. Apparently, under General Dynamics' logic, anything short of blanket immunity would trigger these same policies.[1]

---

1. Government contractors raise this same "hue and cry" about second-guessing of military judgments and increased costs to the government whenever they are held liable for injuries to innocent victims. The contractors advanced the same arguments before Congress in an effort to pass a bill that would provide them with indemnification (defeated) and in an effort to defeat a bill that required warranties on weapon systems (passed). *See* Kellman, *Decoupling the Military/Industrial Complex—The Liability of Weapons Makers for Injuries to Servicemen*, 35 Cleve. St. L. Rev. 351, 393-97 (1987) (citing testimony of government contractors).

Trevino, like *Boyle,* will not require second-guessing of military judgments—any more than any suit in which the discretionary function exception is implicated. The critical inquiry is whether the government, in fact, exercised discretion. As *Trevino* points out, "[t]he trier of fact should not evaluate the wisdom or quality of any government decision, but must locate the actual exercise of the discretionary function." *Trevino,* 865 F.2d at 1480. Here, both lower courts and the Navy itself found that the government had not exercised discretion over the design features in question. *Id.* at 1487 n.13.

Further, there will be no increased costs to the military because of the liability imposed on General Dynamics. As the district court below found, in another context, General Dynamics, as most contractors, is insured for this risk of liability. *See* Order of December 23, 1986 (unreported, attached as Appendix C). An increase in General Dynamics' insurance premiums is such a tangential effect that it does not signal important policy concerns. *See Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 674 n.8 (1977).

Contrary to Petitioner's assertions, important public policy concerns are advanced by the opinions in *Boyle* and *Trevino.* The discretionary function analysis will require private contractors and the government to work closely together to design safer, more efficient equipment. *See* Note, *Extending Immunity to Private Contractors on Government Contracts: Boyle v. United Technologies Corp.,* 4 Brigham Young L. Rev. 835, 842 (1988). Further, the net costs to the government should go down with the inordinate savings in material and human lives. *See Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736, 741-42 (11th Cir. 1985), *cert. denied,* 108 S. Ct. 2896

(1988). If the cost of liability is passed on to the government (such as in manufacturing defect cases or, in cases like this one, where the contractor bears sole responsibility for the defective design), it is better for the government to bear this cost than to have it fall on individual accident victims. *Johnston v. United States,* 568 F. Supp. 351, 357 (D. Kan. 1983).

Moreover, the government contractor defense has always been applied under a "fairness rationale." *Tillett v. J. I. Case Co.,* 756 F.2d 591, 597 (7th Cir. 1985). If the government is truly responsible for the selection of the design, then it is unfair to saddle the contractor with the loss. But where, as here, the private contractor is entrusted with full responsibility for the design—without any exercise of government discretion over the design features in question—and that contractor's defective design kills innocent people, it is equally unfair to allow that contractor to attempt to shift the burden of loss and escape liability. *Cf. McKay v. Rockwell Int'l Corp.,* 704 F.2d 444, 450-53 (9th Cir. 1983), *cert. denied,* 464 U.S. 1042 (1984).

Petitioner argues that *Trevino* creates an "impossible" test for contractors to meet. But, *Trevino,* like *Boyle,* requires only that the government exercise some discretion over the design features at issue. If mere manufacturing or use of equipment with a defective design could satisfy the defense, then private design contractors could never be held responsible for their design defects which cause the death of innocent victims. *See Trevino,* 865 F.2d at 1480-81 n.5. That is not the law, nor should it be. "Federal law provides no defense to the military contractor that mismanufactures military equipment or that

is itself ultimately responsible for the design defect." *Bynum v. FMC Corp.*, 770 F.2d 556, 574 (5th Cir. 1985).

There are no special or important reasons to grant review, and Respondents ask that certiorari be denied.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT BELOW WAS CORRECT ON ANOTHER GROUND.

The government contractor bears the burden to prove, by a preponderance of the evidence, all three elements of the government contractor defense. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). The final element of the defense is that "the supplier warned the United States about the dangers in the use of equipment that were known to the supplier but not to the United States." *Boyle*, 108 S. Ct. at 2518.

A review of the record reveals that General Dynamics did not satisfy this element as a matter of law. Since the element was not satisfied, the defense again fails and the judgment against General Dynamics should be affirmed.[2]

The evidence was undisputed that General Dynamics knew of the system's potential to create a vacuum.

Conway Davis, General Dynamics' on-site supervisor, testified that "we certainly were aware that if you didn't properly vent this space a vacuum would be created." (Tr. 703, 754). Ralph Draper, General Dynamics' expert

2. Respondents are free to raise any ground, even a ground not relied on by the appellate court, to support the judgment. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

witness at trial, testified that General Dynamics knew, when it drew the main hangar vent value, that a vacuum could exist. (Tr. 982-984).

Further, the evidence was undisputed that the Navy did not have any "actual knowledge" of the system's potential to create a vacuum.

In response to a direct question from the court, John Percell, the Naval engineer who certified the GRAYBACK, testified that "the Navy was not aware that this kind of condition could have existed at that time, Your Honor." (Tr. 900). Chief Wadsworth, the "dry side" supervisor at the time of the accident, testified that there were no specific warnings or instructions of any kind, before the deaths, of the specific danger that a vacuum could be created in the diving chamber. (Tr. 148). The Navy's own reports (Pl. Ex. 27, 40), signed by Admiral Fowler, Commander of NAVSEA, stated that a vacuum condition in the diving chamber was never conceived by the Navy as a possibility. (Tr. 300, 305, 493, 898, 900). John Percell further testified that no "casualty bills" had been prepared because the Navy did not recognize the danger of a vacuum as a possibility. (Tr. 904). Commander Robinson, the GRAYBACK's commanding officer, testified that there was no idea in all the Navy that a vacuum condition could occur as it did in the diving chamber (Tr. 216-17). Dr. Paul Lineaweaver, Naval diving safety expert, testified that there was no way to create a vacuum in other systems so the Navy had no knowledge that a vacuum could occur in this system. (Tr. 490, 493).

There was also undisputed evidence that General Dynamics did not warn the Navy about the diving chamber design's potential to create a vacuum.

Paul Lawrence, the Naval section leader in charge of the hangar flood and drain system design, testified that "General Dynamics did not furnish any warnings saying that a vacuum could be pulled if there was some malfunction of the main hangar vent valve and it didn't fully open while the hanger was being drained." (Tr. 413-14). Mr. Lawrence further testified that had General Dynamics provided a warning, the situation would have been investigated and corrected. (Tr. 414).

It is clear from this record that General Dynamics did not meet its burden to prove that it warned the Navy about the dangers "that were known to the supplier but not to the United States." *Boyle,* 108 S. Ct. at 2518.[3]

Absent proof that the government had "actual knowledge" of dangers in the design that were known to the contractor, the final element of the defense is not satisfied and the defense must fail. *Id.; see also Ramey v. Martin-Baker Aircraft Co., Ltd.,* 874 F.2d 946, 951 (4th Cir. 1989); *Smith v. Xerox Corp.,* 866 F.2d 135, 139 (5th Cir. 1989); *Boyle v. United Technologies Corp.,* 792 F.2d 413, 415 (4th Cir. 1986); *Bynum v. FMC Corp.,* 770 F.2d 556, 575-76 (5th Cir. 1985); *Koutsoubos v. Boeing Vertol,* 755 F.2d 352, 354 (3rd Cir. 1985); *Shoenborn v. Boeing,* 769 F.2d 115, 125 (3rd Cir. 1985); *Tillett v. J. I. Case Co.,* 756 F.2d 591, 599 (7th Cir. 1985); *McKay v. Rockwell Int'l Corp.,* 704 F.2d 444, 451 (9th Cir. 1983).

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3. In dicta, *Trevino* indicated that the defects of the design and the dangers of the vacuum were obvious and that the Navy should be "charged" with knowledge of the defect. *Trevino,* 865 F.2d at 1487 n.13.

Since the defense fails, the judgment can be affirmed on this ground alone. Where a judgment can be affirmed on another ground, this Court routinely denies plenary review. *See* Stern, *Supreme Court Practice* § 4.4 at 201 (and cases cited therein).

Thus, Respondents again request that certiorari be denied.

CONCLUSION

For the above reasons, Respondents request that General Dynamics' Petition for Writ of Certiorari be denied.

Respectfully submitted,

WAYNE FISHER
Counsel of Record

DAVID W. HOLMAN

MICHAEL J. MALONEY

FISHER, GALLAGHER, PERRIN
& LEWIS
70th Floor
First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002
(713) 654-4433

Attorneys for Respondents

APPENDIX

APPENDIX

APPENDIX A

SAN FRANCISCO BAY NAVAL SHIPYARD
Vallejo, California 94592

In Reply Refer To:
Code M266/PL:af
5 February 1969

MEMORANDUM

From: Code M263 and Code M266

To: Code M260

Subj: LPSS574 Design and Testing of Piping Passing Through Watertight Bulkheads, report on

Ref:
(a) LPSS574 Detail Specs, Section 9480-0-c.
(b) SSG574 Detail Specs, Section U-9-b.
(c) PDIS 58132 of 27 January 1969
(d) Plan #LPSS574-2099517, Rev. D
(e) Plan #LPSS574-513-4317495, Rev. B
(f) Memo #260F-60 of 7 December 1967
(g) PDIS 55998 of 7 February 1968
(h) PDIS 56419 of 26 April 1968

1. PURPOSE OF REPORT.

During a recent review of piping systems penetrating the pipe/cable trunks between pressure hull and hangars. it became apparent that some new and existing piping systems were not designed to the requirements of references (a) and (b). To correct this design deficiency, references (c) and (d) were issued to provide additional isolation valves in low pressure piping systems. In addition, reference (e) will be issued about 14 February to provide remote operation of two valves in the Port and Stbd hangar lock control bubble. Due to the lateness of this design change, Code M260 requested a written

report as to why this design deficiency was not found and corrected during the early stages of design and plan preparation.

2. BACKGROUND.

a. The GRAYBACK conversion detail specifications, reference (a), and the original building specification, reference (b), require that "piping passing through watertight bulkheads, including the first valve on each side of the bulkhead, shall be designed to withstand the pressure equivalent to the holding depth of the main divisional bulkheads for damage control purposes". During the early stages of design it was found that existing low pressure piping systems on GRAYBACK were not designed to meet this requirement. Reference (f) was issued to request other design piping codes to review specific piping under their cognizance and identify any piping, valves, or fittings that would not withstand the pressure equivalent to the holding depth of the bulkheads. By reference (g) existing low pressure piping systems were tested to further identify piping and components that required replacement. Reference (h) provided the results of this test and recommended corrective action. From the above, it can be seen that all Code M260 piping codes were aware of the specification requirements and initiated the necessary action to correct an existing design deficiency.

b. During the early stages of design, the bulkhead in each hangar at Frame H-19 was being designed for 200 feet. Based on this equivalent pressure, all piping penetrating the bulkhead was of an adequate design. Subsequently, the design depth for this bulkhead was in-

creased to submergence pressure thereby creating a need to redesign the low pressure piping systems. This was not done. The true reasons for this are not known. However, it is reasonable to assume that cognizant personnel in the piping codes were not aware of the change in bulkhead design. One other contributing factor was the fact that original GRAYBACK piping penetrating the pipe/cable trunk was not designed to withstand the design submergence pressure of the hangars. This led engineers to believe that the hangars were excluded from this requirement.

c. The piping bank between the pipe/cable trunk and the hangar bulkheads was originally designed for submergence pressure. This was considered necessary because the piping could be exposed externally to sea pressure when the hangar doors were open while submerged and, from a Sub-Safe standpoint, this piping was considered to be a back-up for the hangar doors. Subsequently, a watertight structure capable of withstanding full submergence pressure was added to completely enclose the piping and to provide a ventilation plenum.

d. The original GRAYBACK hangars did not have divisional watertight bulkheads. It was then reasonable to assume, from a damage control standpoint, that a hangar could be completely flooded without loss of ship, i.e., the large safety tank could be blown to regain neutral or positive buoyancy. Based on this assumption, the bulkhead added at Frame H-19 was not originally considered to be a main divisional bulkhead. Since reference (a) applies to main divisional bulkheads, the increase in design pressures for the piping systems and additional isolation valves was not deemed necessary.

e. After careful consideration it was recently concluded that the hangar bulkheads at Frame H-19 should be considered as main divisional bulkheads. Therefore, the changes to low pressure piping systems indicated by references (f), (g) and (h) should be accomplished. See Figure 1.

3. CONTRIBUTING FACTORS.

a. Several major design changes were made which were not readily apparent to engineers/technicians assigned the responsibility for the affected piping systems.

b. The design work on GRAYBACK was initially given a low work priority due to more important shipyard work. Namely, SSN588, SSBN601, SS567 and SSN579. Due to this extremely heavy workload the piping branches were required to assign less experienced engineers/technicians to GRAYBACK than would normally be assigned. In many cases, farm-in personnel were used to man the GRAYBACK work.

c. The work on GRAYBACK was interrupted on two different occasions. Each time, branch workloads were readjusted to take on new work only to again be directed to resume work on GRAYBACK. This produced extremely heavy work loads in the branches which required a maximum overtime effort and an excessive influx of farm-in people. At one time there were over thirty engineers/technicians assigned to a single section supervisor.

d. Engineers/technicians from various branches were originally assigned the task of preparing specific sections of the conversion specifications. Some of these same

people, who were most knowledgeable on GRAYBACK requirements, were later loaned out by direction to other shipyard groups. Other engineers/technicians were removed from GRAYBACK when design work was stopped and could not be reassigned to GRAYBACK when work started due to other important work assignments.

e. Most of GRAYBACK design work was accomplished by farm-in contractor personnel and not checked by Mare Island experienced technical people.

4. PERSONNEL RESPONSIBLE FOR SUBJECT DESIGN DEFICIENCY.

a. In addition to Branch and Section Supervisors, the following personnel were assigned Lead Engineer or Squad Leader responsibilities for work in this area. It should be noted that no one engineer or squad leader assigned these responsibilities remained in charge from the start of GRAYBACK design to completion of project:

Code M263 Area

W. Montgomery
E. Fujimoto
C. Watson
G. White

Code M266 Area

R. Mendenhall
T. Szafraniec
S. Gladych

Most of the plan work was accomplished by technicians/ draftsmen farmed-in by private contractors.

5. RECOMMENDATIONS:

From the unfortunate experiences encountered on GRAYBACK, the Design Division should certainly take steps to prevent reoccurance of these time-consuming and costly mistakes. One of the most obvious situations that should be avoided whenever possible, is the disruption and confusion caused by stopping and starting a design program. Coupled with this is the resultant loss of experienced talent to other projects. The timely and orderly completion of a design project such as GRAYBACK cannot be accomplished when the various responsible people from numerous branches are scattered all over the shipyard. A design project such as this should be accomplished by assigning the personnel from the branches to a Program Manager and locating these people together in the same area. Planning and Estimating personnel should also be assigned to this group to assist in material procurement problems. These people should then be permitted to work on only the project assigned and not required to perform other tasks.

/s/ F. A. ELLIS
F. A. Ellis

/s/ P. R. LAWRENCE
P. R. Lawrence

Copy to:
M263
M266

APPENDIX B

UNCLASSIFIED

DEPARTMENT OF THE NAVY
Naval Sea Systems Command
Washington, D.C. 20352

In Reply Refer To
C114

5 May, 1983

UNCLASSIFIED—(Unclassified Upon Removal of Exhibits 75, 76, 106 and 117 and enclosure (6))

SIXTH ENDORSEMENT on Captain David R. OLIVER Jr., USN, investigation report of 28 Jan. 1982

From: Commander, Naval Sea Systems Command

To: Judge Advocate General

Via: (1) Chief of Naval Material
(2) Chief of Naval Operations

Subj: Formal investigation to inquire into the circumstances surrounding the personnel casualties incident to the recovery of divers aboard USS GRAYBACK (SS 574) on 16 January 1982.

Ref: (f) NAVMAT P-9290 Systems Certification Procedures and Criteria Manual for Deep Submergence System.

Encl: (10) NAVSEA ltr SEA 921R1/DWJ Ser 270 of 9 Mar. 1982.
(11) NAVSEA Analysis of Design Deficiencies, Material Defects and Unsound Operating Procedures.

1. CNO, by the fourth endorsement, noted that a combination of design deficiencies, material defects, unsound operating procedures and personnel error were identified as contributors to the diving accident. Inasmuch as the first three of these items are within the scope of the Deep Submergence Systems Certification process, the Chief of Naval Material was requested to review and comment on the subject investigation. By the fifth endorsement, the Chief of Naval Material assigned this request to NAVSEA.

2. NAVSEA has conducted a review of the identified design deficiencies, material defects and unsound operating procedures, and both the system certification process and the execution of that process as it relates to the certification of USS GRAYBACK.

3. The recompression chamber and diving system in USS GRAYBACK have been operational since 1969. The complete diving system was certified in 1973 and recertified in late 1980. Subsequent to the subject incident, the NAVSEA System Certification Authority, on 22-25 February 1982, 24-28 May 1982, and again on 4-5 October 1982, conducted on-site surveys of USS GRAYBACK diving system and recompression chamber. The survey teams reviewed all systems contained in GRAYBACK Scope of Certification. The findings of the survey teams are addressed in enclosure (10), and included requirements for design changes and revisions to operating procedures. The design changes that were identified increase the margin of safety and reduce the probability of an operator error which might result in death or injury to diving system or recompression chamber occupants. Enclosure (11) explicitly addresses the design deficiencies,

material defects and unsound operating procedures noted by the second endorsement.

4. Conclusions regarding the certification process requirements and execution as applied to USS GRAYBACK diving systems are as follows:

a. A formal design review of the diving system was not conducted during the initial certification in 1973.

(1) USS GRAYBACK was converted and the diving system installed in 1969. No certification requirements for this system were in existence and the system was placed in operation without formal certification.

(2) CNO requested by letter OP-233C/jad Ser 138P23 of 15 Dec 1972 that NAVMAT develop a plan for the material certification of Navy shipboard hyperbaric facilities.

(3) The certification process for USS GRAYBACK was accomplished using NAVSHIPS 0900-28-2010 as a guide. NAVSHIPS 0900-028-2010 was written to cover manned non-combatant submersibles. This document did not require a detailed design review although such a review was suggested. The governing document for the certification process which should have been used is NAVSHIPS 0994-007-7010 of May 1970, which required a design review.

(4) A formal design review was not conducted, instead reliance was placed on the satisfactory operational history of the diving system between 1969 and 1972 when USS GRAYBACK entered overhaul and on proper maintenance of the system, quality control records, and procedures. There are numerous other older diving systems

and recompression chambers similarly certified without a formal design review.

(5) It is unlikely that a design review would have recognized the basic cause of the incident in USS GRAYBACK, the drawing of a vacuum in the diving chamber through improper operation of the system. However, a detailed design review would have enhanced the formality of the certification process and provided an independent assessment of the design and operation of the system.

b. An error was made during certification of the system in 1980, the certification in effect at the time of the incident. Follow-up of correction of all identified pre-certification audit survey deficiencies was not completed prior to granting certification. Revisions to operating procedures identified under Findings of Fact 28.c and 28.d of the investigation report were not resubmitted by COMSUBPAC to NAVSEA and approved, as required by NAVSEA letter Ser 1809 of 14 July 1980.

5. NAVSEA is taking action to complete formal design reviews of all diving systems and to recommend these reviews be added to NAVMAT-P-9290 as a requirement. NAVMAT-P-9290 will also be revised to identify drawing of a vacuum as a potential hazard which must be considered in reviews of hyperbaric diving facilities. Administrative or disciplinary action will be taken regarding the personnel error that allowed certification to be issued with a portion of a Category 1A audit card incomplete.

6. Concerning the CINCPACFLT request in paragraph 6 of the third endorsement, NAVSEA has determined that a potential does exist in other certified hyperbaric diving systems to develop pressures of less than one atmosphere. These systems are under review, and pro-

cedural and design changes are being developed to account for this situation.

/s/ E. B. FOWLER
E. B. Fowler

Copy to:
CINCPACFLT
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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CAUSE NO. B-83-573-CA

GLORIA TREVINO, et al.

v.

GENERAL DYNAMICS CORPORATION, et al.

(Filed December 23, 1986)

ORDER

Now comes the Court, upon consideration of the the question of whether the United States of America is required to indemnify General Dynamics Corporation for any non insured liabilities to plaintiffs, and enters the following ORDER:

FINDINGS

I. This Court has jurisdiction to determine the question of indemnity and the motion of the United States for a stay of this Court's ruling on indemnification until after General Dynamics obtains a ruling from an auditor or contracting officer under Government Cost Accounting Standards is denied.

II. Nothing in this Order or these findings and conclusions precludes the United States from auditing or disallowing the funds General Dynamics has recovered from the U.S. as attorney's fees associated with the

litigation of this action. The recovery of these fees resulted from General Dynamics including the fees as overhead costs under the current contract between the U.S. and General Dynamics Electric Boat Division. The Court expresses no opinion as to whether the reimbursement of these fees under the Electric Boat Division contract is proper or improper.

III. This Court, in Orders dated September 25, 1985 and February 3, 1986, ruled that the indemnity clause (clause 21) of the contracts entered into by General Dynamics and the United States of America was valid and enforceable and that General Dynamics was entitled to indemnification according to the terms and requirements of the contract as a matter of law.

IV. The contractual agreements between General Dynamics and the United States provided that "the Contractor may, with the approval of the [the Department] maintain a self-insurance program." [Clause 21(a)] The contracts also state that the U.S. must indemnify General Dynamics for death or bodily injury to a third person if General Dynamics is not compensated by insurance or otherwise except when the ". . . contractor has failed to insure as required or maintain insurance as approved by [the Department]." [Clause 21(c)]

V. General Dynamics entered into an insurance policy contract, number ISL G0002755, with the Insurance Company of North America (INA) for the policy year of July 1, 1981 through July 1, 1982; the period covering the incident which precipitated this lawsuit. The contract agreement provided for liability coverage in the amount of $2,000,000.00 per occurrence with an aggregate limit of $4,000,000.00. The contractual arrangement also pro-

vided for a $2,000,000.00 deductible per occurrence with a $4,000,000.00 aggregate deductable. In other words, this "fronting policy" resulted in the self insurance by General Dynamics for any loss below $4,000,000.00. Despite being in a position to purchase adequate insurance for the benefit of the Government, which had been obtained at reasonable costs in prior and subsequent years, General Dynamics unilaterally elected in that policy year to bear the risk and self insured itself without the approval of the United States Government.

VI. General Dynamics entered into an insurance policy contract for the same period, number PY036981, with Lloyds Underwriters of London, England which insured General Dynamics for any liability losses in excess of $4,000,000.00.

VI. The policy with Lloyds also provided that General Dynamics was insured for any amount over $500,000.00 per occurrence "where there is not concurrent Underlying Insurance" up to $6,000,000.00 per occurrence with an aggregate limit of $6,000,000.00.

VIII. For the purposes of determining the applicability and effect of the insurance policies in question for the accident which precipitated this lawsuit, the death of four seamen aboard the U.S.S. Grayback, constituted one occurrence.

VII. General Dynamics was self insured up to $2,000,000.00 per occurrence and $4,000,000.00 in aggregate by the utilization of a deductible clause that equated to the face value of the coverage with INA.

VIII. General Dynamics was self insured without United States Government approval in accordance with Clause 21 of the contract and the Federal Acquisition

Regulations, 48 C.F.R. and General Dynamics never utilized the required procedure to seek approval to maintain a self insurance program.

RULING

From the standpoint of the United States, General Dynamics is considered to be insured and therefore, the indemnity clause of the contracts do not operate; the United States Government is not required to indemnify General Dynamics for any liabilities adjudicated against General Dynamics as a result of this lawsuit.

Signed this 23rd day of December, 1986.

/s/ ROBERT M. PARKER
Robert M. Parker
United States District Judge

No. 89-376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY BRIEF

HERBERT L. FENSTER
Counsel of Record

RAYMOND B. BIAGINI
CHARLOTTE D. YOUNG

McKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, DC 20005
(202) 789-7500
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

1. Whether the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that the "approval" element of the government contractor defense requires proof that a government official performed a policy level "substantive review and evaluation" constituting a discretionary act under the Federal Tort Claims Act.

2. Whether the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that General Dynamics failed to prove the "approval" element of the government contractor defense despite undisputed facts that the government was fully aware of the alleged defects yet chose to use the product as designed for thirteen years.

3. Whether the holding by the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) that government approval under the government contractor defense can occur only during the design stage, conflicts with the Fourth Circuit's post-*Boyle* decision in *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989) and the several federal circuit court decisions prior to *Boyle* that approval can occur after the design stage where the government subsequently discovers the defects yet chooses to use the product as designed.

QUESTIONS PRESENTED FOR REVIEW BY RESPONDENT

1. Whether the final element of the government contractor defense can be satisfied absent proof that the government had "actual knowledge" of the dangers in the design that were known to the private design contractor.

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---

PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 22.5, Petitioner General Dynamics Corporation replies to Respondents' Brief in Opposition filed October 5, 1989.

At the outset, Petitioner notes that in the Brief in Opposition ("Opposition"), Respondents have proposed a fourth issue for review by this Court, thus essentially agreeing that a grant of *certiorari* is necessary. Although Petitioner disagrees that the issue is one that should be considered by this Court, Respondents' approach strengthens the argument that this case is appropriate for *certiorari.*

In the Opposition, Respondents have attempted to inject numerous facts into this case such that it appears unique and not "certworthy." This is not a factually bound case. Indeed, Respondents' Opposition underscores one of the important legal questions presented for this

Court's review: Does the "approval" element of the government contractor defense under *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) require proof that a government official performed a policy level "substantive review and evaluation" constituting a discretionary act under the Federal Tort Claims Act ("FTCA")? Contrary to Respondents' assertion, that question is a simple question of law which does not require this Court to "reexamine the record." Opposition at 12.

In *Boyle*, this Court held that the approval element of the government contractor defense assures "that the suit is within the area where the policy of the 'discretionary function' would be frustrated." 108 S. Ct. at 2518. Both parties cite this language to support their completely different positions. Petitioner asserts that this Court only intended the discretionary function exception to be the doctrinal basis for the defense. Petition at 12-14. Petitioner also contended that this Court did not intend the discretionary function exception to be included as an element of proof in demonstrating approval. In stark contrast, Respondents rely on precisely the same language in arguing that a contractor must demonstrate that the government exercised a policy level discretionary function, and that it *is* an element of proof for that prong of the defense. Opposition at 8. These clearly conflicting interpretations of the same phrase in *Boyle* bring into bold relief the key legal issue presented for review by Petitioner, i.e., the role, if any, the discretionary function exception of the FTCA plays in establishing the approval element of the government contractor defense.

In the Opposition, Respondents agree with Petitioner's position that there is "extraordinary tension among the federal circuits regarding the parameters of the discretionary function exception." Opposition at 10. Respondents state, however, that Petitioner "wants this Court, in one fell swoop, to resolve all conflicts on the discretionary function exception." *Id.* In fact, Petitioner's argument

is that the "extraordinary tension" and confusion among the circuits regarding the parameters of the exception is yet another reason it could not have been intended as an element of proof in demonstrating the government contractor defense.

Respondents' Opposition also makes reference to a second issue presented by Petitioner for this Court's consideration: whether approval can occur after the initial design stage. Petitioner's Brief did not specifically argue that approval took place during the design stage because the facts referenced in the Fifth Circuit decision inevitably lead to the conclusion that approval occurred during the Navy's thirteen years of use of the diving chamber. Petition at 20 n.11. The parties have agreed, however, that in attempting to carry out *its* contractual responsibility to approve the design, five Navy officials signed the relevant working drawings in the "Review and Approval" block. *See* Opposition at 3; Petitioner's Brief at 63a. The Fifth Circuit's holding that such a review does not constitute "approval" highlights the intrusive nature of the Fifth Circuit's approval test and further supplements the argument that *certiorari* should be granted to define and clarify the first element.[1]

Finally, Respondents argue that Petitioner failed on the third element of the defense, and consequently the Fifth Circuit's judgment can be affirmed on another ground and does not merit *certiorari*. Opposition at 19. After a review of the entire record, the Fifth Circuit clearly held that Petitioner proved the third element because the Navy and Petitioner had equal and actual knowledge of the risks associated with the diving chamber. *Trevino*, 865 F.2d 1474, 1487 (5th Cir. 1989), App.

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[1] *See* Petition at 18. (Under its approval test, the Fifth Circuit in *Trevino* examined closely the qualifications and competency of the signing military personnel in determining whether approval took place. This is the epitome of judicial "second-guessing" of military decisions.)

to Petition at 27a ("Because both General Dynamics and the Navy knew that the system as designed could create a partial vacuum, and because both the Navy and General Dynamics could see that the final design included no safety devices, liability of General Dynamics could not be based upon non-disclosure of these dangers.").[2] Denial of *certiorari* because other, independent grounds exist to support the lower court is not appropriate where those grounds require a conclusion contrary to the lower court. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61-62 n.11 (1975) (argument not made subject of a cross petition was not considered because it would alter the judgment of the lower court rather than providing an alternative ground for affirming it); *Langnes v. Green*, 282 U.S. 531, 539 (1931) (review of Respondents' alternate ground proper because Respondents offered no objection to the decree of the lower court). In this case, the Fifth Circuit's judgment binds Respondents unless Respondents cross petition to have that part of the decree reviewed. *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52, 66 (1927) (Respondents, without presenting a cross petition for *certiorari*, sought a reversal of a distinct portion of the lower court decree and were denied right of review); *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937) (" 'Where each party appeals each may assign error, but where only one party appeals the other is

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[2] As stated in the Petition, weighing evidence regarding the sufficiency of military decisionmaking (here, whether or not the approval of a diving chamber design by Navy officers was made with informed military expertise) requires courts to delve into matters beyond their constitutional authority and institutional competence. Petition at 18. Moreover, Petitioner was unable to explore the breadth of the Navy's prior knowledge and was precluded from presenting any evidence regarding the Navy's prior knowledge of diving chamber designs because the Navy invoked a cloak of secrecy over such information in the interest of national defense. Tr. at 11-23; 238.

bound by the decree in the court below.' ") (citation omitted).

In conclusion, Respondents' argument that in order to resolve these issues "this Court will be forced to reexamine the record" clearly misconstrues the issues before this Court. Petitioner's issues all turn on discrete areas of law which are worthy of *certiorari* not only because of the conflicts created within the circuits, but perhaps more importantly because the Fifth Circuit's opinion conflicts with this Court's opinion in *Boyle*. For these reasons, and as more fully set forth in its Petition, Petitioner respectfully requests this Court grant its Petition.

Respectfully submitted,

HERBERT L. FENSTER
Counsel of Record

RAYMOND B. BIAGINI
CHARLOTTE D. YOUNG

MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, DC 20005
(202) 789-7500

Attorneys for Petitioner

October 24, 1989

(3)

No. 89-376

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION OF GENERAL DYNAMICS CORPORATION FOR A WRIT OF CERTIORARI

DUNAWAY & CROSS
MAC S. DUNAWAY
Counsel of Record

GARY E. CROSS
PETER B. SHERMAN
1146 19TH STREET, N.W.
WASHINGTON, D.C. 20036
(202) 862-9700

ATTORNEYS FOR AMICUS
AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA, INC.

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BRIEF OF AMICUS AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION OF GENERAL DYNAMICS CORPORATION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus Aerospace Industries Association of America, Inc. is the national trade association representing manufacturers of aerospace-related equipment; its membership, which includes petitioner General Dynamics Corp., routinely contracts with the Government for the design of equipment.

SUMMARY OF THE ARGUMENT

In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), the Court addressed the question of "when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect." *Id.* at 2513. In answering that question, the *Boyle* Court established the requirements that must be met for a Government contractor to assert successfully the so-called "Government contractor" defense. One of the requirements established by *Boyle* is that "the United States approved reasonably precise specifications" for the equipment alleged to be defective. *Id.* at 2518.

Less than a year after *Boyle*, the United States Court of Appeals for the Fifth Circuit had occasion to determine what Boyle meant by the word "approved" in the phrase "approved reasonably precise specifications." *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989). *Trevino* held that the Government has not "approved" a design feature developed by a contractor unless the Government actually exercised its discretion to select that design feature. *Id.* at 1486.

Trevino's answer to the question of what does and does not constitute Government "approval" for purposes of the Government contractor defense misinterprets *Boyle*, frustrates the policies that *Boyle* sought to advance, and causes conflict and confusion among the circuit courts as to the proper application of *Boyle*. Amicus Aerospace Industries Association of America, Inc. urges the Court to grant the petition for a writ of *certiorari* in order to correct *Trevino's* error and to guide the lower courts as they are called upon to decide when the Government contractor defense is available.

ARGUMENT

A. *Trevino's* Definition of "Approved" Conflicts with a Basic Premise of *Boyle.*

The Court in *Boyle v. United Technologies Corp.* adopted the following three-part test for determining the availability of the Government contractor defense to contractors who design military equipment for the government:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

108 S. Ct. at 2518. The United States Court of Appeals for the Fifth Circuit in *Trevino v. General Dynamics Corp.* then interpreted *Boyle's* test as follows:

> The government contractor defense as reformulated in *Boyle* protects government contractors from liability for defective designs *if discretion over the design feature in question was exercised by the government.*

865 F.2d at 1486 (emphasis added). This interpretation of *Boyle*, conditioning the availability of the Government contractor defense on whether the Government considered and selected the particular design feature alleged to be defective, cannot be squared with the central analytical underpinnings of *Boyle's* three-part test.

Boyle recognizes, implicitly but necessarily, that the Government contractor defense may be available in cases where the

Government had no knowledge of, much less exercised discretion over, a design defect in military equipment. As here relevant, *Boyle* requires as conditions of the defense that the contractor provided the Government with, and the Government approved, "reasonably precise" specifications, and that the contractor warned the Government of dangers known to the contractor but not known to the Government.[1] It follows that *Boyle* does *not* deny the defense where (i) reasonably precise specifications have been provided to the Government, but the later-alleged design defect is not disclosed by those reasonably precise specifications; and (ii) the Government contractor does not itself know of the defect.

Under *Boyle*, then, the Government contractor defense may be asserted successfully even though the Government, notwithstanding having examined reasonably precise specifications, never learned of the design defect that later came to be the central issue in a tort suit. If the Government was unaware of a defective feature of a design, then the Government cannot have exercised its discretion to choose or reject that defective feature. Yet the Government contractor defense is still available under *Boyle*, so long as the specifications were reasonably precise and the Government contractor withheld no information in its possession but not in the Government's.

This conclusion flows inevitably from *Boyle's* requirement that the specifications approved by the Government be only *reasonably* precise, as opposed to *exhaustively* precise. *Trevino's* holding that the Government contractor defense is available only if the Government exercised discretion over the actual design feature in question cannot be reconciled with *Boyle's* permissiveness regarding the design specificity

[1]As *Trevino* notes, "the second element, that the product comply with the design specifications, was not implicated in this case . . .." 865 F.2d at 1487.

necessary to satisfy *Boyle's* first requirement. It makes no sense to hold that the Government must approve a design feature that need not necessarily even have been provided to the Government; accordingly, *Trevino's* definition of "approved" is in error.

On this point, *Trevino* states: "The requirement that the specifications be precise means that the discretion over *significant details and all critical design choices* will be exercised by the government." 865 F.2d at 1481 (emphasis added). Amicus respectfully disagrees with this important assumption. In the sentence just preceding the one quoted, and elsewhere throughout the opinion, *Trevino* recognizes that the specifications need be only *reasonably* precise. *Id.* This certainly permits the possibility that certain detailed, albeit perhaps defective, design features will escape Government notice.[2]

Judge Jolly's dissent from the Fifth Circuit's denial of General Dynamics' request for an *en banc* hearing forcefully makes the point that "approved" was an inappropriate word for the Court to have selected if the Court intended that the Government contractor defense would be denied whenever the Government has not exercised its policy-level discretion to *select* a defective design. *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *reh'g denied en banc*, 876 F.2d 1154 (5th Cir. 1989) (Jolly, J., dissenting). *Boyle's* requirement that the specifications be only "reasonably precise," as opposed to "absolutely precise" or "comprehensive," is equally indicative that *Boyle* does not require that the Government consciously and substantively evaluate *every* aspect of a contractor-developed design.

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[2]The point is not whether the defects alleged in *Trevino* were disclosed by General Dynamics' blueprints; it appears that they were. *See Trevino*, 865 F.2d at 1477 (General Dynamics supplied 71 pages of detailed working drawings). The point is that *Trevino's* definition of "approved" fails to account for the clear analytical implications of the three-part *Boyle* test.

Boyle's third requirement — that the contractor warn the Government of dangers of which the contractor is aware but of which the Government is unaware — equally betrays *Trevino's* analysis. The inescapable implication of this requirement is that the Government contractor defense is not lost merely because the contractor was unaware of, and therefore did not warn the Government of, a danger caused by a design defect. *Boyle* foresees that this may happen, notwithstanding the Government's scrutiny of reasonably precise specifications, and accounts for it in the carefully crafted third requirement. *Trevino's* requirement that the Government have considered the precise design defect at issue, or else the defense is lost, flies in the face of *Boyle's* recognition that some defective features will escape both the contractor's and the Government's evaluation.

Trevino's attempt to account for the presence of *Boyle's* third requirement is tortured at best. *Trevino* states:

> The Court's inclusion of a warning element must indicate that approval requires some level of evaluation and review; otherwise a government contractor might argue one day that it should have the benefit of the defense despite its failure to give a warning because the government had rubber-stamped the design, because the information withheld would have been of no use to the government and was not desired by the government, and because the provision of the information would not have affected the government's "approval" of the design.

865 F.2d at 1481. This analysis amounts to saying that the third requirement is important so that a contractor will not "argue one day" that it need not meet that very requirement; the third requirement supports *Trevino*, if at all, only when

Trevino assumes it away. Viewed straightforwardly, *Boyle's* third requirement refutes *Trevino*, for the simple reason that the Government cannot exercise discretion to choose a design defect that the contractor, unaware of it, has not disclosed.

The requirement that the contractor provide only *reasonably* precise specifications, and that the contractor warn of only *known* dangers, demonstrates that the Government contractor defense is not dependent in all cases upon the Government's deliberate selection of the allegedly defective design feature. *Trevino's* central holding cannot be squared with *Boyle's* plain language or with its analytical framework.

B. *Trevino's* Holding that the Courts Must Locate the Exercise of Government Discretion as to Discrete Design Features Threatens Undue Interference with the Government's Procurement Policies and Would Frustrate the Central Concerns of *Boyle*.

Trevino's interpretation of the requirement that "the United States approved reasonably precise specifications" is not only semantically and logically at odds with *Boyle's* three-part test; it also portends disruptive and unworkable judicial interference in the Government's military procurement decisions. *Trevino* thus frustrates the spirit, as well as the letter, of *Boyle*.

Boyle recognizes that balancing the needs of the military procurement process against the rights created by the Federal Tort Claims Act, 28 U.S.C. § 1346(b), necessitates some judicial inquiry into the availability of the Government contractor defense in individual cases.[3] But it is one thing for a court

[3]But there is no question that the rights of injured claimants must sometimes give way to the Government's interest. *Boyle* recognizes that "the federal interest embodied in the 'discretionary function' exemption" requires more than "a perfectly reasonable tort rule." 108 S. Ct. at 2518.

to examine the degree of precision in the design specifications provided to the Government by its contractors and to determine whether the Government approved those specifications, and quite another for the courts to evaluate in detail the Government's decisionmaking procedures in searching for the elusive "exercise of discretion" concerning the most minute details of equipment design. The latter exercise, required by *Trevino*, will put courts in the middle of the military procurement process, spawn conflicting results on similar facts, and burden the Government to an extent well beyond that sanctioned by *Boyle*.

Trevino states: "The trier of fact should not evaluate the wisdom or quality of any government decision, but must locate the actual exercise of the discretionary function." 865 F.2d at 1480. In purporting to do so, however, *Trevino* interprets the meaning of Government memoranda, second-guesses the Government's personnel assignments, and weighs the respective expertise of the Government's and the contractor's engineers. 865 F.2d at 1486. Thus, in the guise of searching for the Government's exercise of discretion, *Trevino* actually displaces that discretion.[4] If a court disagrees with the Government's design choice in a given case, it need only undertake a *Trevino*-like microscopic analysis of the Government's decisionmaking process to conclude that what appeared to be an exercise of discretion, such as deciding which personnel would review a contractor's design proposals, was instead an abdication of it. Nothing in *Boyle*, in the discretionary function

[4]For example, *Trevino* acknowledges that the Government may exercise its discretion through incompetent personnel, but states that the use of incompetent personnel "may be evidence that the government does not intend to exercise design discretion . . ." and concludes "[t]hat seems to be the case here." 865 F.2d at 1487 n.12. This loose analysis is *carte blanche* for the courts to question, and thus to penalize through denial of the Government contractor defense, military decisions on how to allocate personnel resources.

exemption of the Federal Tort Claims Act, or in separation-of-powers principles, justifies this result.

The thrust of *Trevino* is to minimize the role of Government contractors in the design of military equipment. There is functionally little difference in requiring that the Government develop all military designs, and requiring, as *Trevino* does, that the Government weigh the merits of every design feature, no matter how detailed, developed by its contractors for it. *Trevino* thus has the effect of imposing the requirement set forth in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988), that the Government contractor's participation in the design process be minimal if the Government contractor defense is to be available. *Boyle*, of course, expressly rejected *Shaw's* restrictive approach. 108 S. Ct. at 2518. *Boyle* teaches that it is not the courts' place to decide whether or when the Government should rely upon contractors to develop designs for military equipment. The practical application of *Trevino* threatens exactly such interference.

C. *Trevino*'s Narrow Interpretation and Application of the Government Contractor Defense Test Conflicts With the Test as Applied in Other Circuits.

In holding that the Government contractor defense was not applicable in *Trevino*, the Fifth Circuit focused on the manner and timing of the Government's participation in the development of the designs created by General Dynamics. According to *Trevino*, the only method by which the approval requirement of *Boyle* can be met is by the Government's substantive review and evaluation of the allegedly defective design feature.

Trevino's interpretation of *Boyle* creates a conflict with other circuits and within the Fifth Circuit itself. In *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), a case decided the same day as *Trevino*, a different panel of the Fifth Circuit examined the phrase "reasonably precise specifications" within the meaning of *Boyle's* first requirement. Although *Smith* focused primarily on this aspect of the *Boyle* test, it was implicit in *Smith* that Government approval requires only the Government's review and assent, which is, as Justice Jolly stated, a "considerably less stringent requirement than imposed by the *Trevino* panel." *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *reh'g denied en banc*, 876 F.2d 1154, 1157 (5th Cir. 1989) (Jolly, J., dissenting). Although the two Fifth Circuit panels emphasized different aspects of the Government contractor test, a fair reading of their respective opinions places them clearly in conflict in their interpretations of *Boyle*.

In dissenting from the Fifth Circuit's denial of General Dynamics' request for an *en banc* hearing, Judge Jolly, who authored the opinion in *Smith*, stated: "I believe that *Trevino* has effectively rewritten the Supreme Court's test for government contractor immunity given in *Boyle* . . .." *Id.* at 1155. Specifically, the dissent faulted *Trevino's* failure to use the "plain meaning" of approval, with the result of forcing the Government to "*establish* reasonably precise specifications . . .." *Id.* (emphasis in original). According to the dissent, the proper inquiry under *Boyle* to determine whether there has been approval is as follows:

> was the challenged feature disclosed with reasonable precision in the accepted design documents, and was the design accepted on behalf of the government by an officer who had, and knew he or she had, the duty and authority to decline or accept the challenged

> design feature on safety grounds if he or she deemed it appropriate to do so?

Id. at 1156.

This interpretation of *Boyle* is supported by *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), in which the court stated:

> In *Boyle*, the Court recognized a broad formulation of the government contractor defense that shields manufacturers of products made for the government from tort liability for flaws in product design.
>
> * * *
>
> In the military context, this immunity serves the further important purpose of shielding sensitive military decisions from scrutiny by the judiciary, the branch of government least competent to review them.

Id. at 1315.

In upholding the Government contractor defense, *Harduvel* stated that the "defense requires 'only that the government approve reasonably precise specifications,' and is met where, as here, the contractor incorporated government performance specifications into a design that the government subsequently reviewed and approved." *Id.* at 1320 (citing *Smith v. Xerox Corp.*).

The notion of Government approval suggested in *Smith* and applied in *Harduvel* is clearly broader than that found in *Trevino*. While *Trevino* demands greater involvement by the judiciary in determining whether the military made appropriate procurement decisions, *Smith* and *Harduvel* recognize *Boyle*'s purpose to preserve the military's discretion in the procurement area. Clearly, *Trevino*'s narrow interpretation of approval

cannot be reconciled with the broad interpretation of the Government contractor defense set forth in *Boyle* and followed in both *Smith* and *Harduvel*.

D. The Navy's Continued Use of the Equipment with Knowledge of the Alleged Defects Constitutes Approval under the Government Contractor Defense.

Boyle does not address the issue of when the Government's approval of a design must occur. Lower courts have held that the Government's approval can be manifested by the subsequent use of the equipment by the military where such use is accompanied by the military's knowledge of the alleged defect. In *Schwindt v. Cessna Aircraft Co.*, CV485-472 (S.D. Ga. 1988), the court refused to limit the time of Government approval to the design and delivery stages, stating as follows:

> the relevant time to evaluate the first prong is not limited to the time when the Air Force originally took delivery of the 0-2 aircraft. The Air Force's later decisions regarding the equipment may constitute approval of reasonably precise specifications.

Mem. Op. at 7.

Although there was ample evidence in *Trevino* that the Navy used the diving chamber with the knowledge of, and after experience with, the alleged design defects, *Trevino* failed to give this fact any weight in its decision. This failure overlooks a wealth of subsequent history and puts *Trevino* in conflict with other circuits on this score as well.

In *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988), the contractor had designed the equipment without any participation by the Army.

However, the court found that the contractor met its burden of proving that the Government approved reasonably precise specifications when it showed that the Army continued to use the equipment after learning of the design defects. Indeed, the Government's decision to continue to use the equipment with the known defects "amply establish[es] government approval of the alleged design defects." *Id.* at 412; *see also Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989). Thus, even in the absence of contemporaneous consideration of the design by the military, these cases conclude that approval by the Government occurs when the military makes use of the equipment after obtaining knowledge of the design defects.

The facts in *Trevino* were that the Navy knew of the alleged defects from the time it began to manufacture the diving chamber and on at least four occasions had experienced problems similar to the one that occurred on the date of the accident. The Navy's continued use of the diving chamber with knowledge of the alleged design defects constituted approval under prior case law — *Trevino's* failure to credit these facts puts it into direct conflict with that case law and further supports General Dynamics' petition.[5]

---

[5]Similarly, Judge Jolly would hold that when the Government makes use of equipment for a period of years with no complaints, and has knowledge of design defects, it has approved the contract specifications within the meaning of *Boyle*. 876 F.2d at 1156.

CONCLUSION

For the foregoing reasons, Amicus Aerospace Industries Association of America, Inc. urges that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

DUNAWAY & CROSS
MAC S. DUNAWAY
Counsel of Record

GARY E. CROSS
PETER B. SHERMAN

1146 19TH STREET, N.W.
WASHINGTON, D.C. 20036
(202) 862-9700

ATTORNEYS FOR AMICUS
AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA, INC.

September 8, 1989

(H)

CAUSE NO. 89-376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION

Petitioner

V.

GLORIA TREVINO, ET AL,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF BELL HELICOPTER TEXTRON INC. IN SUPPORT OF PETITION OF GENERAL DYNAMICS CORPORATION FOR A WRIT OF CERTIORARI

R. David Broiles
Attorney of Record

George Galerstein

BROWN, HERMAN, SCOTT,
DEAN & MILES
203 Fort Worth Club Building
306 West Seventh Street
Fort Worth, TX 76102-4988
(817) 332-1391 Metro: 429-0851

ATTORNEYS FOR
BELL HELICOPTER TEXTRON INC.

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BELL HELICOPTER TEXTRON INC.'S BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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2. Army Regulation 27-40.

3. Dr. Dan Schrage and Mr. Charles C. Crawford, Retired.

4. Letter to Mr. Robert Garfield, Chief, General Law Division, AVSCOM Legal Office, St. Louis, Missouri re: approval for Dan Schrage to become a Bell Helicopter expert witness in the *Beavers v. Bell Helicopter Textron Inc. case.*

5. Letter to Mr. Robert Garfield, Chief, General Law Division, AVSCOM Legal Office, St. Louis, Missouri re: approval for Charles C. Crawford to become a Bell Helicopter expert witness in the *Beavers v. Bell Helicopter Textron Inc. case.*

6. Letter to R. David Broiles from John P. Galligan, Lt. Col., U.S. Army, Chief, General Litigation Branch, Washington, D.C. denying both Dan Schrage and Charles C. Crawford to be used as expert witnesses for Bell Helicopter Textron Inc.

7. Letter to Lt. Col. John P. Galligan, U.S. Army, Chief, General Litigation Branch, Washington, D.C. re: renewal of request to employ Dan Schrage and Charles C. Crawford as expert witnesses for Bell Helicopter Textron Inc.

8. Letter to R. David Broiles from John P. Galligan, Lt. Col., U.S. Army, Chief, General Litigation Branch, Washington, D.C. denying the renewed request for both Dan Schrage and Charles C. Crawford to be used as expert witnesses for Bell Helicopter Textron Inc.

9. Letter of Consent, by Herbert L. Fenster, Counsel for Petitioner General Dynamics Corporation, dated August 30, 1989.

10. Letter of Consent, by David W. Holman, Counsel for Respondent Gloria Trevino, et al, dated September 15, 1989.

CAUSE NO. 89-376

GENERAL DYNAMICS CORPORATION

Petitioner

V.

GLORIA TREVINO, ET AL,

Respondents

BELL HELICOPTER TEXTRON INC.'S BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF THIS COURT:

BELL HELICOPTER TEXTRON INC. respectfully submits its BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI and would show the following:

I.

INTEREST OF AMICUS CURIAE

The interest of BELL HELICOPTER TEXTRON INC. is set forth in its foregoing MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI. Permission has been granted by the counsellors in this case in accordance with Supreme Court Rule 36.1 by letters of consent, which are attached hereto and incorporated herein for all purposes as Attachment Nos. 9 and 10.

II.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 825 F.2d 1474 (1989) regarding the proof required for the first element of the military contractor defense as set forth by this Court in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) (that the United States approved reasonably precise specifications) is completely at odds with and vitiates the intent and effect of that decision. Operating under the requirements imposed by the Fifth Circuit in this case does not mean merely that stricter demands are made upon a contractor to establish the military contractor defense. As a practical matter it means that there may be no such defense available.

The Fifth Circuit held that government approval of a design for military equipment without proof of substantive review or evaluation by the military of the relevant design feature does not establish the first element of the military contractor defense. But a military contractor may not be able to establish proof of substantial review of a design by the military without involving testimony by military personnel as to their background and the extent of their evaluation and understanding of the relevant design feature, and such testimony by

military personnel may not be available to a contractor.

Further, by requiring the court to determine and judge whether the approval by the government was given after the government had engaged in a substantive review and evaluation of the design feature at issue, the Fifth Circuit's decision requires second-guessing of military decisions by the court.

III.

THE MILITARY REFUSES TO ALLOW ITS PERSONNEL TO TESTIFY REGARDING THE EXTENT OF ITS REVIEW AND UNDERSTANDING OF A DESIGN FEATURE

Bell has had recent experience which shows that not only would the requirement of proof of "**substantive review**" be tantamount to second-guessing of the military's judgment, but it is a burden of proof that the contractor may not be able to meet because the military refuses to allow its personnel and former employees to testify.

The Department of Defense does not want and may not allow its employees to testify in civil cases. The military officers who might provide the testimony required by *Trevino* are prohibited by the Government from testifying with respect to their decisions without government permission.

In a Policy Letter entitled, "Accident AfterMath: What to Do When the lawyer Calls" (Attachment 1), the Judge Advocate of the U.S. Army Safety Center informed acting and retired Army personnel:

> It should be noted that any litigation following a military aviation accident usually involves the service member or his/her survivors filing a lawsuit against the manufacturer of the aircraft or of a component. This is because of the U.S. Supreme Court's ruling in December 2, 1950 in the case of Feres v. U.S.
>
> If you are contacted to give testimony as an expert you should refuse to make any statement except that appropriate clearance must be obtained from the Office of the Judge Advocate General, Headquarters, Department of the Army.
>
> After leaving the military service or federal employment there is generally no restriction on testifying as an expert witness so long as you did not act for the U.S. Government in those matters.

This policy is based on Army Regulation 27-40 (Attachment 2).

In a recent case, *Beavers v. Bell Helicopter Textron Inc.*, Cause No. 68, 282-C, in the 251st Judicial District of Potter County, Texas, involving the failure of a bearing on a Bell AH-1 Cobra gunship helicopter, the plaintiff alleged a design defect in the swashplate assembly. Bell contended that the failure was the result of increased

on the rotor system caused by the Army's use of the helicopter, and certain modifications, and defended on the basis of the military contractor defense.

Shortly after the *Trevino* decision, and because of its language, Bell's attorneys perceived the need to have the testimony of Dr. Dan Schrage, who was a member of the Army Aviation Systems Command Source Selection Committee, and Mr. Charles C. Crawford, former Technical Director of Research, Development, and Engineering for the U.S. Army Aviation System Command (both are now retired, *see*, Attachment 3). These men had been intimately involved in the historical development and participation of the Army in the design and manufacture of the Bell AH-1 Cobra helicopter, and could testify specifically to the requirements of *Trevino* as to "**substantive evaluation**" and "**understanding**" of the Army. The testimony of these retired Army employees would provide the most convincing evidence for the jury to judge whether the Army decision makers understood the issue with regard to the swashplate bearing.

Because of the holding in *Trevino*, Bell requested permission to use the testimony of Dr. Schrage and Mr. Crawford. Following the dictates of Army Regulation 27-40, Bell requested authorization for such testimony from the Chief, General Law Division, AVSCOM Legal Office, by letters dated March 16, 1989 (Attachments 4 and 5). By

reply letter, dated March 30, 1989 (Attachment 6), the Army denied the requests, stating:

> The policy of the Army is one of strict impartiality in litigation in which the Army is not a named party, a real party in interest, or in which the Army does not have a significant interest. When a witness with an official connection with the Army testifies, there is a natural tendency to assume that the testimony represents the official views of the Army even where there are express disclaimers to the contrary.
>
> The Army is also interested in preventing the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities. When Army personnel testify as witnesses in such unrelated litigation, their official duty performance is invariably disrupted, often at the expense of the Army's mission accomplishment and the federal taxpayer.
>
> Finally, the Army is concerned about the potential conflict of interest inherent in the unrestricted appearance of its personnel as witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust in the integrity of our Government.

In the event that the Army's denial was based upon a concern that the testimony of Dr. Schrage and Mr. Crawford would be used to establish their opinions as independent experts, Bell renewed its request

(Attachment 7), disclaiming such intention and emphasizing that these persons, by virtue of their direct involvement in the Army's approval of the specifications, understood the implications of the design at issue. Specifically, Bell would use the testimony of these retired Army personnel only to show that the Army was not "**rubber stamping**" a contractor's decision but was exercising a "**discretionary function**".

Nevertheless, the Army again denied Bell's request to depose Dr. Schrage and Mr. Crawford (Attachment 8), and the presentation of the government contractor defense was greatly undermined because key witnesses could not testify.

IV.

EVEN IF MILITARY PERSONNEL WERE PERMITTED TO TESTIFY, SUCH TESTIMONY WOULD INVOLVE THE COURT OR JURY IN A SECOND-GUESSING OF MILITARY PROCUREMENT DECISIONS

It should be appreciated that had the Army permitted Dr. Schrage and Mr. Crawford to testify, the Fifth Circuit's requirements as to "**approval**" would then involve second-guessing by the court or jury of the military's decision. It is illusory to conclude that a defense contractor can establish that there was a "**substantive review and evaluation**" of the design or that the officer

signing the approval "**understood**" the specifications without having the judgment of the armed services put in issue.

The court or jury would be obliged to decide whether Dr. Schrage and Mr. Crawford had engaged in a substantive-enough review of the specifications, whether they "**understood**" the specifications, and whether their decisions were "**informed military decisions**". Plaintiff would, of course, attempt to show that the Army had not engaged in a substantive review of the specifications and that the Army did not really understand the issues of safety presented by the relevant design feature. Plaintiff would attempt to discredit the testimony of Dr. Schrage and Mr. Crawford and might seek military personnel who would disagree with the decisions made. The court or jury would be faced with passing judgment as to the "**informed**" nature of the Army's decision, as to whether the Army had engaged in what Dr. Schrage and Mr. Crawford were to describe as a substantive review, and the result would be that civilians would determine whether the Army sufficiently understood what it was doing when it approved the design of the Bell helicopter. The court or jury would engage in second-guessing of the selection of the appropriate design for military equipment to be used by our Armed Forces, a selection process that this Court has described in *Boyle* as involving "**not merely**

engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." Whether the jury found that the military "**knowingly**" and "**fully understood**" what it approved, or whether it found to the contrary, the jury would be "**second-guessing**" the military. Either way, military decisions are being reviewed by a court, a task for which the judiciary is ill-equipped and has little competence.

Nowhere in the precise and elaborate analysis by this Court in *Boyle* is there any hint, much less directive, that in order to show "**approval**", the Government must be shown to have engaged in "**substantive review or evaluation.**"

V.

THE TREVINO DECISION INDICATES A MISUNDERSTANDING OF THE PROCEDURE BY WHICH THE GOVERNMENT PROCURES MILITARY EQUIPMENT

The Fifth Circuit's concern that "**if the signature of a government employee on a design drawing in a box marked 'approval' establishes the first element of a military contractor defense as a matter or law, government contractors would make sure that they would**

would never face liability for defective design of military equipment merely by bargaining for a guarantee that some federal employee would place his signature at the bottom of every sheet of paper involved in the design of a product and thus confer the government's approval" reflects a misunderstanding of the process engaged in by the government and the contractor in the purchase of military equipment.

Such a concern, that a contractor might "**bargain**" for a "**mere approval**" signature, is hardly the material of which good policy is formulated. In some 30 years of contracting with the Government for military equipment, Bell Helicopter has never been confronted with such a situation. In *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985), the Fifth Circuit recognized "**. . . military contractors are often unable through negotiation to alter the design specifications of their military products . . . .**" Is there now reason to suggest the military will blindly stamp "**approved**" on anything a contractor submits?

The Fifth Circuit has held that "It would be absurd to fashion a rule . . . disallowing liability . . . when the federal officer signing the design approval did not review or understand the specifications." (Emphasis added.) *Trevino*, at 1481.

These requirements are in direct conflict with the Supreme Court's interdiction of "**second-guessing of the**

military's judgment through state tort suits against contractors [which] would produce the same effect sought to be avoided by the FTCA exception." *Boyle*, at 957. How much must the federal officer know in order to "**know what is there**"? Must one go into his educational background to prove what the federal officer fully understood the issues involved? What is a substantive evaluation and review? What evidence is needed to prove the person who ultimately signed in the approval box was capable of a substantive review and approval?

One can envision trials where experts for the plaintiffs will testify that the design feature complained of is unreasonably dangerous and the person who approved it could not have "**understood**". By definition, if he had understood it he would not have approved it because reasonable people who understand what they are doing do not approve unreasonably dangerous designs.

The Fifth Circuit has misinterpreted the military contractor defense and will cause the trial of and second-guessing of military procurement decisions, thus defeating the import of the holding in *Boyle*. To require proof of "**substantive review and evaluation**" is to invite the very second-guessing through tort suits that this Court, and almost all courts, including the Fifth Circuit, have sought to avoid.

CONCLUSION

Since the Fifth Circuit's decision is clearly not the law as set forth in *Boyle*, this Court should grant the Petition for Certiorari and expressly overrule the *Trevino* rationale.

Respectfully submitted,

BROWN, HERMAN, SCOTT,
DEAN & MILES
203 Fort Worth Club Building
306 West Seventh Street
Fort Worth, TX 76102-4988
(817) 332-1391 Metro: 429-0851

R. David Broiles
Counselor of Record

George Galerstein

ATTORNEYS FOR
BELL HELICOPTER TEXTRON INC.

CERTIFICATE OF SERVICE

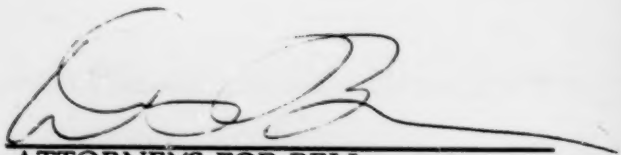
This is to certify that a true and correct copy of the above and foregoing BELL HELICOPTER TEXTRON INC.'S BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI has been mailed, on this 27th day of September, 1989, pursuant to the Federal Rules of Civil Procedure to the following:

Mr. John F. Daly
U.S. Department of Justice
Washington, D.C. 20530

Mr. Herbert L. Fenster
McKENNA, CONNER & CUNEO
1575 I Street, N.W.
Washington, D.C. 20005

Mr. Michael Malloney
FISHER, GALLAGHER, PERRIN & LEWIS
70TH Floor, Allied Plaza Bank
1000 Louisiana
Houston, TX 77002

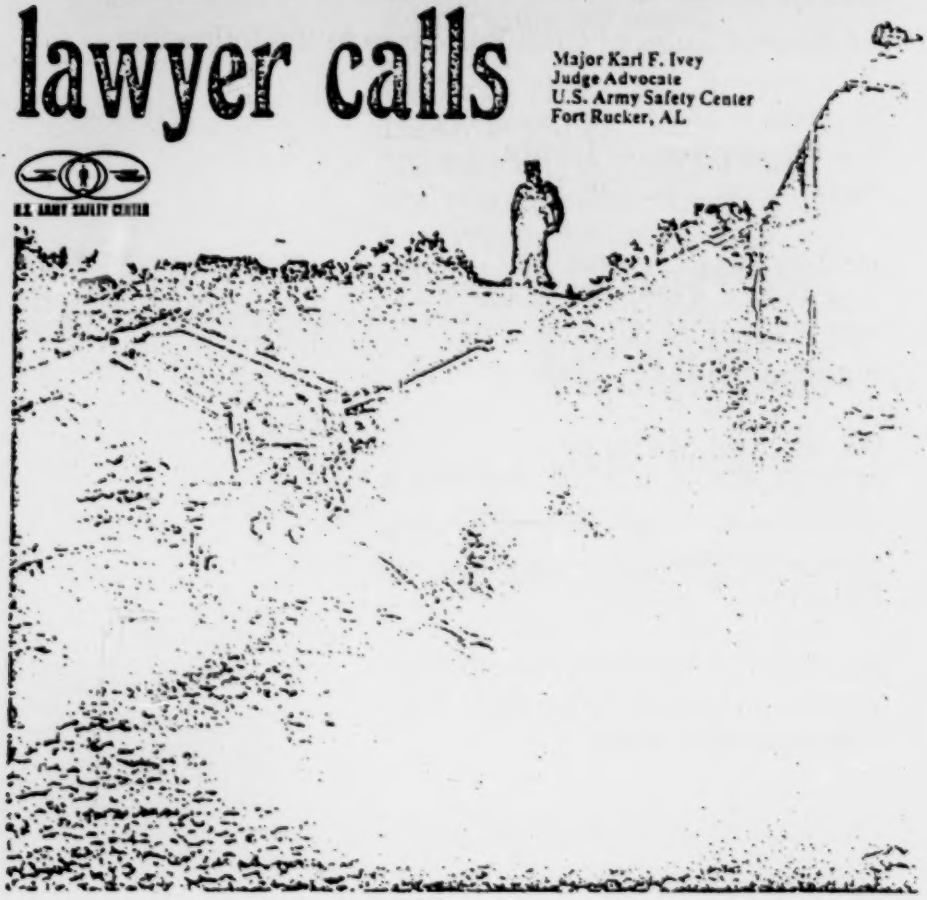
Ms. Rebecca Newman Strandberg
4720 Montgomery Lane, Suite 912
Bethesda, MD 20814



ATTORNEYS FOR BELL
HELICOPTER TEXTRON INC.

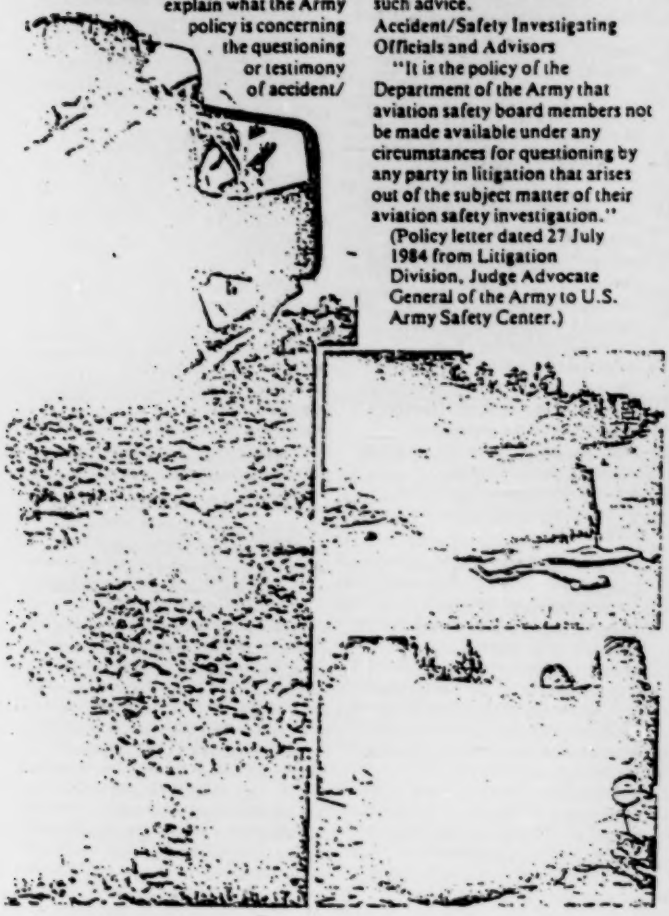
Accident Aftermath: What to do when the lawyer calls

Major Karl F. Ivey
Judge Advocate
U.S. Army Safety Center
Fort Rucker, AL



ATTACHMENT 1

THE INCREASING number of lawsuits related to military aviation mishaps has led to several recent instances where accident/safety investigating officials have been asked to provide statements, depositions and courtroom testimony about their involvement in the accident investigation process and what the investigation revealed. The purpose of this article is to explain what the Army policy is concerning the questioning or testimony of accident/safety investigating officials, "expert" testimony by Army personnel, or testimony of those people who are merely witnesses to events. This article should not be considered as a substitute for specific legal advice on the issues which you, as a prospective witness, must resolve before testifying. You should always consult a judge advocate or Army civilian legal advisor for such advice.



Accident/Safety Investigating Officials and Advisors

"It is the policy of the Department of the Army that aviation safety board members not be made available under any circumstances for questioning by any party in litigation that arises out of the subject matter of their aviation safety investigation."

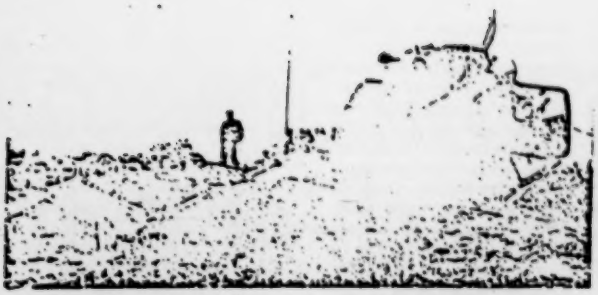
(Policy letter dated 27 July 1984 from Litigation Division, Judge Advocate General of the Army to U.S. Army Safety Center.)

The Army does not permit complete release of any aviation safety investigation reports, which by regulation are privileged "limited use" reports releasable within the Army only for accident prevention purposes (see AR 385-40, paragraph 1-9a). The reason for this strict control on the release of such reports is the Army's critical interest in insulating aviation safety board members from outside pressures that could affect their judgment or cause them to be less than candid in their reports. In addition, some information obtained in this investigative process is obtained only under a promise of confidentiality. If the integrity of the process is to be maintained, that confidentiality cannot be compromised.

For many of the same reasons, the Army cannot allow aviation safety board members to be questioned about their investigations. It would be virtually impossible to preclude inquiry into matters such as statements of opinion, comments, findings of accident causes, recommendations for corrective action and confidential witness statements, all of which would be exempt from release if requested under the Freedom of Information Act. If questioning of aviation safety board members were permitted, we would, in effect, be allowing the requesting parties to obtain information indirectly which they could not obtain directly, contrary to clearly established Army policy and Army regulations which govern the release of such information. (See AR 385-40, paragraph 1-7, and DOD Directive 6055.7.)

This restriction on releasing accident report data is a lifetime restriction. If former investigators are suspected of a breach of privileged data they can be investigated by the Inspector General even though they are no

ATTACHMENT 1



longer in federal employment. (See AR 600-50, chapter 5.) If the Inspector General finds there has been a violation of the Standards of Conduct, the Secretary of the Army can impose sanctions against the violator (such as restriction from entering Army installations or other restrictions). Anyone who profits by such a conflict of interest violation (i.e., is paid expert witness fees for testifying) may have court action taken against them through the Department of Justice by the Department of the Army for forfeiture of their ill-gotten gains.

"The Army does not permit complete release of any aviation safety investigation reports, which by regulation are privileged 'limited use' reports releasable within the Army only for accident prevention purposes."

Since many investigators may be living in, or assigned to, other locations away from the location of the accident when the request for testimony or questioning is first made, it is imperative that they refuse to make any statements without first consulting the nearest Army judge advocate or Army civilian legal advisor. That legal counsel should contact the Judge Advocate of the U.S. Army Safety Center (AV 558-3819/3005 or FTS 533-3819/3005). The Army lawyers will handle the matter for the safety investigator or board member/advisor in accordance with the procedures of AR 27-40.

These requirements do not apply to those people who are appointed to conduct "boards of investigation" or other MACOM or corps-directed safety investigations. Such investigations do not result in "limited use" investigation reports. Aircraft accident investigations and Safety Center ground accident investigations are the most common types of limited use investigation reports. For investigations where "general use" investigation reports are prepared, safety officials or board members should follow the procedures described below in testifying about information concerning the conduct of Army activities and information received pursuant to official duties.

Expert Witnesses for Private Litigation

"It is the policy of the Department of the Army to maintain strict impartiality in private litigation. It is for this reason that AR 27-40, paragraph 7-17, generally prohibits military personnel and civilian employees from appearing as expert witnesses in private litigation. This prohibition is strictly applied in cases where the expert testimony sought involves knowledge and expertise acquired in the performance of duties pursuant to or in support of an official investigation of any type." (Policy letter dated 27 July 1984 from Litigation Division, Judge Advocate General of the Army to U.S. Army Aviation Center.)

"Some information obtained in the investigative process is obtained only under a promise of confidentiality. If the integrity of the process is to be maintained, that confidentiality cannot be compromised."

Private litigation is a court action or lawsuit in which the U.S. Army or the U.S. Government is not a party and has no direct or indirect interest in the outcome of the court case. For the reasons explained in the next paragraph, there is much private litigation following Army fatal and disabling injury mishaps. Since many Army aircraft and much equipment is unique or is not commonly present in the civilian community, it can be expected that attorneys for either side in private litigation will seek out aviators, maintenance personnel, or others in the military services to testify about the equipment involved in an accident or to testify about some technical procedure at issue in the private litigation.

"It is the policy of the Department of the Army to maintain strict impartiality in private litigation."

It should be noted that any litigation following a military aviation accident usually involves the servicemember or his/her survivors filing a lawsuit against the manufacturer of the aircraft or of a component. This is because of the U.S. Supreme Court's ruling in December 1950 in the case of *Feres* v. *U.S.* That decision established that servicemembers or their surviving family members cannot sue the U.S. Government for injuries received or for death of the servicemember which was

ATTACHMENT 1

"...to military service," even though there is clear negligence on the part of some government official or Army member.

If you are contacted to give testimony as an expert you should refuse to make any statement except that appropriate clearance must be obtained from the Office of the Judge Advocate General, Headquarters, Department of the Army. You should refer the request through your supervisors and commander to your installation legal advisor or judge advocate for resolution of the request.

After leaving the military service or federal employment there is generally no restriction on testifying as an expert witness so long as you did not act for the U.S. Government in those matters and you are not using "insider" information. AR 600-50 contains most of the conflict of interest prohibitions and should be consulted prior to your departure from your last position in the military or as an employee of the U.S. Government.

Military Personnel and Civilian Employees Who Witness an Accident or an Event in Litigation

The appearance of military personnel and civilian employees in private litigation, or for questioning or interviewing by a litigant's attorney, is solely a personal matter between the prospective witness and the litigant's attorney who requests them, subject to the approval of the individual's commanding officer or supervisor. (See AR 27-40, paragraph 7-12.) If for personal reasons the military servicemember or civilian employee does not want to be interviewed, or to testify, he or she must be counseled by the installation's judge advocate or legal advisor on the legal consequences of any refusal. The use of a deposition [illegible] testimony not in court but with all litigants' attorneys present) is encouraged since this procedure helps to minimize interference with the witness' performance of duties.

Obviously many people who witness an event have factual information, based on their personal observations, about an accident. Generally there is no restriction against testimony by these witnesses. You may not testify or be interviewed without Department of the Army approval if it appears that (1) the testimony/interview will concern the manner in which Army or unit activities were conducted, or (2) information exempt from release to the public is sought, or (3) information is sought which was acquired in the performance of your official duties. (See AR 27-40, paragraph 7-17c.) In any case, you are never wrong in seeking the advice of your judge advocate or Army civilian legal advisor on the propriety of your testifying or being interviewed by a lawyer concerning an Army accident.

Some Final Considerations

As citizens each of us has a moral obligation and a responsibility to truthfully present facts and come forward with information so that justice can prevail. On the other hand, if for personal reasons you do not want to give testimony in a court case, there may be legal or regulatory authority to support your desire not to testify. Legal counselling can dispel some of the fears that you may have and may indicate to you that in the end you may still be forced to testify by a court order. If you do have to testify there are many circumstances in which you may have an Army legal representative present while you are testifying and you may travel to the trial in a duty status. (See AR 27-40, chapter 7.) After seeking legal advice both you and your superiors will be in a good position to determine if your testimony is warranted.

About the Author

Major Karl F. Ivey graduated from the United States Military Academy at West Point in 1969 with a B.S. degree in engineering. He completed law school at Memphis State University in 1976 and is a member of the Tennessee Bar Association and the Lawyer-Pilot Bar Association.

Major Ivey has served as Judge Advocate of the Army Safety Center since September 1982. His prior assignments included Defense Counsel/Legal Assistance Officer, 1st Armored Division, in Germany; Deputy Judge Advocate at SHAPE, Belgium; and as the Chief Trial Counsel, 101st Airborne Division (Air Assault.)

Prior to attending law school, Major Ivey served in Vietnam with the 173d Airborne Brigade and in CONUS with the 82d Airborne Division. He has been awarded the Ranger Tab, Parachute Badge, and Air Assault Badge.

ATTACHMENT 1

Army Regulation No. 27-40

Legal Services - Litigation

Chapter 7

ATTACHMENT 2

ARMY REGULATION
No. 27–40

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, 15 June 1973

LEGAL SERVICES

LITIGATION

Effective 1 July 1973

This regulation consolidates and revises AR 27–37, "Claims in Favor of The United States For Damage to or Loss or Destruction of Army Property" (Chap. 5, Section I); AR 27–38, "Claims in Favor of The United States for the Reasonable Value of Medical Care Furnished by The Army" (Chap. 5, Section II); AR 27–40, "Litigation—General Provisions" (Chap. 1–4); AR 27–41, "Avoiding Unnecessary Litigation—Administrative Collection, Compromise, and Referral of Claims in Favor of the Government" (Chap. 5); AR 27–44, "Minor Offenses Committed on Federal Reservations" (Chap. 6); and AR–45, "Release of Information and Appearance of Witnesses" (Chap. 7). Local limited supplementation of this regulation is permitted, but is not required. If supplements are issued, one copy of each will be furnished the Office of The Judge Advocate General, HQDA (DAJA–LT).

* This regulation supersedes AR 27–37, 18 October 1967; AR 27–38, 15 January 1968, including all changes; AR 27–40, 4 April 1972; AR 27–41, 17 May 1972; AR 27–44, 17 April 1969, and AR 27–45, 28 August 1968, including all changes.

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CHAPTER 7

RELEASE OF INFORMATION AND APPEARANCE OF WITNESSES

Section I. GENERAL

7–1. Purpose. This chapter governs the release of *information exempt from release to the public* when this information is sought for use in litigation and the appearance of military personnel and civilian employees of the Army as witnesses before civilian courts and regulatory bodies. It pertains to private litigation as well as to litigation in which the United States has an interest.

7–2. Explanation of terms. *a. Information exempt from release to the public.* Those categories of information delineated or defined by paragraph 10, AR 345–20.

b. Private litigation. Litigation in which the United States is not a party and in the outcome of which it has no interest, either direct or indirect.

c. Litigation in which the United States has an interest.

(1) The United States or one of its agencies or instrumentalities has been or probably will be named as a party; or

(2) The suit is against a military member or civilian employee of the Army or one of its agencies or instrumentalities and arises out of the individual's performance of official duties; or

(3) The suit arises out of an Army contract, subcontract, or purchase order under the terms of which the United States may be required to reimburse the contractor for recoveries, fees, or costs of the litigation; or

(4) The suit involves administrative proceedings before Federal, State, municipal, or foreign tribunals or regulatory bodies that may result in a financial impact upon the Army; or

(5) The suit may affect the operations of the Army or purport to require, limit, or interfere with official action by a military member or civilian employee; or

(6) The United States has a financial interest in the plaintiff's recovery; or

(7) Foreign litigation in which the United States is bound by treaty or agreement to insure attendance of military personnel or civilian employees.

d. Release of information. The disclosure of information from Army records by furnishing copies, extracts, or summaries of such records; by permitting examination of such records; or by permitting interview with or statement by the custodian or other person having knowledge of their content.

e. Subpoena. Includes Subpoena Ad Testificandum and Subpoena Duces Tecum.

7–3. Related regulations. The basic policies for release of information are in AR 345–20. Other regulations restrict the release of specific types of information and are applicable when consistent with this regulation and AR 345–20. Special note should be made of the regulations listed in appendix J.

7–4. Reference to The Judge Advocate General. *a.* Requests and subpoenas for *information exempt from release to the public* when this information is sought for use in litigation or for the appearance of witnesses which require approval by the Department of the Army will be submitted to HQDA (DAJA–LT) WASH DC 20310, except:

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(1) Those involving patents, copyrights, privately developed technical information, or trademarks will be addressed to HQDA (DAJA-PA) WASH DC 20310.

(2) Those involving problems of taxation will be addressed to HQDA (DAJA-PL) WASH DC 20310.

(3) Those involving communication, transportation, or utility service proceedings will be addressed to HQDA (DAJA-RL) WASH DC 20310.

b. Requests and subpoenas forwarded should be accompanied by such of the following data as may be appropriate:

(1) Parties (named or prospective) to the proceeding, their attorneys, and case number, where appropriate;

(2) Party making the request (if a subpoena, indicate moving party) and his attorney;

(3) Name of tribunal in which the proceeding is pending;

(4) Nature of the proceeding;

(5) Date of receipt of request or date and place of service of subpoena;

(6) Name, grade, position, and organization of person receiving request or served with subpoena;

(7) Date, time, and place designated in request or subpoena for production of information or appearance of witness;

(8) Nature of information sought or document requested, and place where document is maintained;

(9) A copy of each document requested. If the document is voluminous, a description may be forwarded in lieu of the copy;

(10) Analysis of the problem with recommendations of the forwarding agency.

7–5. Determination by The Judge Advocate General. The Judge Advocate General, acting personally or through such subordinates as he may designate, will coordinate within Headquarters, Department of the Army, all requests or subpoenas referred to him pursuant to paragraph 7–4. He will determine whether the witness should be permitted to testify or to grant an interview or whether the information should be released. Authority may be granted for release of information or for the appearance of a witness even though the information may be used by or the appearance may be on behalf of a party whose interest is adverse to the interest of the United States.

7–6. Response to subpoena. This paragraph provides policy and procedures for response to subpoenas. Additional guidance is furnished in appendix K.

a. No present or former military member or civilian employee of the Department of the Army shall, in response to the demand of a court order or other authority, produce or disclose any *information exempt from release to the public* contained in the files of the Department of the Army or disclose or produce any *information exempt from release to the public* acquired as a part of the performance of his official duties or because of his official status without the prior approval of the Secretary of the Army.

b. When an official of the Department of the Army to whom a subpoena is referred concludes that a record should not be released or a witness should not appear and testify because such record or testimony would disclose *information exempt from release to the public*, that fact will be reported immediately to The Judge Advocate General as provided in paragraph 6–4. If The Judge Advocate General determines that a record should not be released or an individual should not testify on a particular matter in response to a subpoena, he will advise the person served of the action to be taken (*Touhy v. Ragen*, 340 US 462).

c. If a person served with a subpoena fails to receive authorization or other instructions prior to the time fixed for the production of records or appearance in court, he should communicate with counsel responsible for issuing the subpoena, state that he can produce the desired record or can testify on the matter only if authorized, and request a postponement pending receipt of authorization or ascertain if

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other releasable information can be substituted. If postponement is refused and other information will not suffice, he should appear in court, submit a copy of this and other applicable regulations, and inform the court that—

(1) Records of the Department of the Army can be produced or that he may appear and testify on the matter only if authorized by the Secretary of the Army or by the person designated by the Secretary to act on his behalf, and

(2) He has requested but has not received authorization or other instructions. He should respectfully request the court or other authority to stay the report or subpoena pending receipt of authority or other instructions.

d. If the court or other authority declines to stay the effect of its demand for *information exempt from release to the public* pending receipt of instructions from the Secretary of the Army, or if the court or other authority rules that the demand must be complied with irrespective of instruction from the Secretary of the Army not to produce or disclose the information sought, the present or former military member or civilian employee upon whom the demand was made shall decline respectfully to comply with the demand.

e. In each instance described above, a judge advocate or civilian attorney of the command concerned should accompany and advise the witness during the court proceedings. Within the United States, the local US Attorney should be consulted.

Section II. RELEASE OF INFORMATION IN CONNECTION WITH LITIGATION

7–7. Scope. This section deals with requests and subpoenas for information to be used in litigation.

7–8. Records of the Army and other agencies. *Preservation.* In order to preserve the integrity of records of the Department of the Army, originals of books, records, papers, or documents will not be furnished to any person or agency for use as evidence in public or private legal proceedings. Properly authenticated copies of Government records may be admitted in evidence in lieu of originals. See 28 USC 1733.

b. Authentication of copies. Copies of Department of the Army records approved for release under this regulation will, when necessary, be authenticated for introduction into evidence by use of a Department of the Army certificate (DA Form 4) prepared in the manner shown in figure 7–1. Negative results of a search are shown in figure 7–2. After the custodian has executed his certificate, the preparing agency will forward the DA Form 4 and a copy of the record to the Headquarters, Department of the Army staff agency indicated below for authentication by the Secretary of the Army:

(1) Records maintained in US Army Engineer Districts and Divisions will be forwarded to the Chief of Engineers, Department of the Army, Washington, DC 20315.

(2) All other records will be forwarded to the official designated in paragraph 11, AR 345–20, as having release authority for that type document.

c. Fees and charges. The schedule of fees and charges for searching, copying, and certifying Army records is set forth in AR 37–30.

d. Documents originated by agencies or organizations outside the Department of the Army (e.g., FBI reports, State traffic accident investigation reports, civilian hospital records) which are included with Army records may be released only with the consent of the originating agency or organization. Normally an individual requesting such records should be advised to direct his inquiry to the originating agency or organization.

7–9. Requests and subpoenas for information releasable to the public. Requests or subpoenas for *information not exempt from release to the public* will be handled as prescribed in AR 345–20.

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7–10. Requests and subpoenas for information exempt from release to the public. Requests and subpoenas duces tecum for *information exempt from release to the public* and which may not be released under paragraph 7*c*, AR 345–20, will be processed as follows:

a. Subpoenas for defense (classified) information which cannot be declassified will be referred to The Judge Advocate General as provided in paragraph 7–4.

b. Subpoenas for medical or personnel records, not releasable to the public or under paragraph 7*c*, AR 345–20, will be responded to by submitting properly authenticated copies of the records to the court (or to the clerk of the court) where:

(1) The subpoena is accompanied by a court order, or such order is separately served, which orders the person to whom the records pertain to consent to the release of the specific records or orders authenticated copies delivered to the clerk of the court and that order has determined their materiality and the nonavailability of a claim of privilege; or

(2) The clerk of the court is empowered by local statute or practice to receive the records under seal subject to a request that they be withheld from the parties until the court determines the records are material to the issues and until any question of privilege is resolved; or

(3) The custodian is required to appear and authenticate the records, he may appear in court with a copy of the records under seal, state their general content, and surrender them with a request that they remain sealed until the court determines their materiality and privileged nature, if any.

c. Judge advocates and legal officers may furnish to the attorney for the injured party and to the tort feasor's insurance company a copy of the narrative summary of medcial care which relates to a claim under chapter 5. If additional medical records are requested, only those which directly pertain to the pending action will be furnished. If furnishing copies of medical records will be injurious to the injured party's health or prejudice the cause of action, the matter will be reported to HQDA (DAJA–LT) WASH DC 20310.

d. Other requests from the Department of Justice, U.S. Attorneys, States' Attorneys, or attorneys for private litigants will be forwarded to The Judge Advocate General as prescribed in paragraph 7–4.

United States of America

DEPARTMENT OF THE ARMY

El Paso, Texas (PLACE) 1 June 1972 (DATE)

I HEREBY CERTIFY that the document attached hereto is a true and correct copy of the Narrative Summary, Standard Form 502, pertaining to the hospitalization of Jane Doe during the period 3-6 June 1970, an official document in the custody of the Registrar of William Beaumont General Hospital.
(Identify Document) (Office of Custodian)

(Signature of Custodian)
JOHN SMITH
Captain, MSC
Registrar

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, , Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this day of . 19

Secretary of the Army.

By
Administrative Assistant

DA FORM 4 REPLACES EDITION OF 1 OCT 47, WHICH WILL BE USED.

Figure 7–1

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United States of America

DEPARTMENT OF THE ARMY

Washington, D. C. (PLACE) 1 June 1972 (DATE)

I HEREBY CERTIFY that after diligent search, no General Court-Martial Record of trial pertaining to Private John Doe, SSAN:123-45-6789, could be found in the custody (Identify Document) of the Clerk of Court, U. S. Army Legal Services Agency, Office of The Judge Advocate (Office of Custodian) General.

(Signature of Custodian)

JOHN SMITH
CW4, USA
Clerk of Court

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, , Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this day of , 19

Secretary of the Army.

By
Administrative Assistant

DA FORM 1 JAN 72 4 REPLACES EDITION OF 1 OCT 47, WHICH WILL BE USED.

Figure 7–3

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Section III. DEPARTMENT OF THE ARMY PERSONNEL AS WITNESSES IN CIVIL LITIGATION

7–11. Scope. This section deals with interviews and appearances of military personnel and civilian employees of the Army as witnesses in person or by deposition before civil courts and administrative tribunals pursuant to request of counsel or in response to subpoena or other order of court. It is applicable to private litigation as well as to litigation in which the United States has an interest.

7–12. Private litigation. *a.* The appearance of military personnel and civilian employees in private litigation is solely a personal matter between the prospective witness and the requesting party unless—

(1) The testimony involves *information exempt from release to the public*, information obtained in an official capacity, or information relating to Army activities; or

(2) The prospective witness is solicited to testify as an expert; or

(3) The absence of a prospective witness from duty will seriously interfere with the accomplishment of the military mission of the command or organization; or

(4) The appearance involves oversea travel.

b. Requests for interviews with or subpoena for the testimony of military personnel or civilian employees in private litigation will be referred to the individual's commanding officer or supervior. Except in instances involving (1) through (4) above, the commander or supervisor may permit the requested interview or subpoenaed attendance.

c. The decision whether to grant an interview or to testify, as distinguished from the questions of release of information and Army authorization for any necessary absence from duty is a personal matter for the individual. If for personal reasons the military member or civilian employee does not desire to grant the interview or to testify, he will be counseled by the judge advocate or legal adviser on the legal consequences of his refusal.

7–13. Exempt information, Army activities, or official capacity. Where the expected testimony will involve *information exempt from release to the public*, Army activities, or information obtained in an official capacity, the matter will be referred to the judge advocate or legal adviser of the command or agency of the individual whose testimony is requested. The judge advocate or legal adviser will process the question of release of the information sought in accordance with section II. If it is determined that the information may be released, the individual will be permitted to be interviewed or to appear as a witness provided such interview or appearance will not unduly affect the mission of the command or agency. If available, a judge advocate or civilian attorney of the Department of the Army should be present during any interview to act as legal representative of the Army. If a question is propounded which seeks information not previously authorized for release, the legal representative will prohibit the witness from answering and, if necessary to avoid release of the information, terminate the interview. Before terminating the interview, however, every effort should be made to substitute releasable information and to continue the interview as to other subjects. A report of the matter will then be forwarded to The Judge Advocate General as outlined in paragraph 7–4. Any written statement furnished by the military member or civilian employee will be prepared under the supervision of the legal representative.

7–14. Expert witnesses. *a.* The Department of the Army maintains a strict impartiality in private litigation and conflicts of interest are to be avoided (AR 600–50). Military personnel and civilian employees may not appear as expert witnesses in private litigation or in litigation in which the United States has an interest for a party other than the United States without the prior approval of Headquarters, Department of the Army. These requests will be forwarded to The Judge Advocate General in accordance with paragraph 7–4.

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b. This limitation does not apply to members of the Army Medical Department or other qualified specialists when—

(1) They testify in private litigation involving patients they have treated, investigations they have made, laboratory tests they have conducted, or action they have taken, and they limit their testimony to factual matters such as their observations of the patient, or other operative facts, the treatment prescribed or corrective action taken, course of recovery or steps required for repair of damage suffered, and contemplated future treatment or utility of item damaged. Their testimony may not extend to hypothetical questions or to a prognosis.

(2) Requests are for expert witnesses on behalf of the United States in cases involving medical care recovery claims under section II, chapter 5.

c. Requests for expert witnesses from US Attorneys or attorneys representing the interests of the United States will be met or referred to HQDA (DAJA–LT) WASH DC 20310.

7–15. **Litigation in which the United States has an interest.** a. Requests for interviews with or subpoenas for testimony of military personnel or civilian employees in litigation in which the United States has an interest will be referred to the judge advocate or legal adviser of the command or agency of the individual whose testimony is requested. Except as set out in *b* below and paragraph 7–14*c*, the judge advocate or legal adviser will forward the request or subpoena to The Judge Advocate General in accordance with paragraph 7–4. This forwarding requirement includes requests received from the Department of Justice. As each request or subpoena involves a question of release of information, the judge advocate or legal adviser will insure that this aspect of the request or subpoena is also presented in the reference to The Judge Advocate General. Interviews or appearances may be authorized even though the information may be used in litigation by parties whose interests are adverse to those of the United States.

b. The judge advocate or legal adviser may authorize the appearance of witnesses requested by U.S. Attorneys or by attorneys representing the interests of the United States (e.g., attorney handling the Government's medical care claim under section II, chapter 5) provided—

(1) The request or subpoena does not require travel by the witness outside the judicial district (unless the distance to be traveled is less than 100 miles) or oversea theater in which the witness is stationed, assigned, or employed (see para 7–18*a*(2) and 7–19).

(2) The testimony of the witness does not involve *information exempt from release to the public.*

(3) The testimony, if the witness is a member of the Army Medical Department, will not be injurious to the health of the patient concerned.

c. When requested by a US Attorney, the judge advocate or legal adviser will insure that military or civilian employee witnesses are not reassigned or otherwise removed from the judicial district without first advising the US Attorney. If a witness is vital to the Government's case, informal arrangements should be made to retain the witness in the command until trial. If this is not feasible or if satisfactory arrangements cannot be made with the US Attorney, the matter will be reported to HQDA (DAJA–LT) WASH DC 20310.

7–16. **Oversea witnesses.** Request or subpoena for a witness stationed outside the continental limits of the United States, including Alaska and Hawaii, to appear before a tribunal within the continental limits of the United States will be referred to the judge advocate or legal adviser of the command or agency of the individual whose testimony is requested. The judge advocate or legal adviser will forward the request or subpoena to The Judge Advocate General as provided in paragraph 7–4. See 28 USC 1783 on the subpoena of a person in a foreign country.

7–17. **Depositions.** a. *Policy.* The use of a deposition rather than the personal appearance of a witness is encouraged when this will minimize

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interference with the performance of the Army's mission.

b. General. Depositions or other evidentiary statements taken from military personnel or civilian employees for use in state or Federal courts are governed by the rules of the court having jurisdiction of the matter. Depositions or other evidentiary statements for use before foreign tribunals are governed, generally, by the law of the foreign state in which the depositions are to be used and the provisions of applicable treaties and agreements. (See 28 USC 1781 as to the use of letters rogatory.) Military personnel and civilian employees abroad who receive requests or notices for the taking of a deposition or other evidentiary statements shall advise the appropriate judge advocate or legal adviser of this fact immediately.

c. Procedure. A request or notice for the taking of a deposition from a party to private litigation will be referred to the witness' commanding officer or supervisor unless the expected testimony concerns Army activities, *information exempt from release to the public*, or information obtained in the performance of official duties or there is a request that the deposition be taken by an officer. All other requests or notices will be referred to the judge advocate or legal adviser for the command.

(1) If the United States has an interest in the litigation the judge advocate or legal adviser will refer the matter to The Judge Advocate General.

(2) If the expected testimony in cases of private litigation involves Army activities, *information exempt from release to the public*, or information obtained in the course of official duties, the judge advocate or legal adviser will process the question of release of information as provided in section II. If it is determined that the information may be released, the judge advocate or legal adviser will authorize the taking of the deposition provided it will not affect unduly the military mission of the command or agency. A judge advocate or civilian attorney of the Department of the Army should be present during the taking of the deposition and should take action as prescribed in paragraph 7–13 when necessary.

(3) If a request or notice for the taking of a deposition includes a request that the deposition be taken before an officer, the judge advocate or legal adviser may authorize the use of a Reserve officer. Regular Army officers should not be utilized. See 10 USC 3544(b); Rule 28 FRCP, Title 28 App USC.

d. Appearance as counsel. A request to use a military member or civilian employee as counsel for one of the parties to the taking of a deposition will be referred to the judge advocate or legal adviser for appropriate action. See paragraph 1–4.

e. Expert witnesses. The provisions of paragraph 7–14 concerning expert witnesses are applicable to testimony by deposition.

7–18. Status, travel, and expenses of witnesses.

a. Witnesses for the United States.

(1) *Status of witness.* A military member authorized to appear as a witness for the United States will be placed on temporary duty. The status of a civilian employee will be determined in accordance with Federal Personnel Manual 630.10–3 (hereinafter called FPM). Military personnel and civilian employees who appear as necessary witnesses for a party asserting the Government's claim under chapter 5, for medical care are witnesses for the United States within the meaning of this paragraph provided the Government's claim is large enough to justify the expenditure.

(2) *Travel arrangements.* Travel arrangements for witnesses for the United States normally are made by the Department of Justice through The Judge Advocate General for other than local travel. Instructions for this travel, including fund citation, will be issued to the appropriate commander by Headquarters, Department of the Army. A US Attorney, or an attorney asserting the Government's medical care claim under chapter 5 may make arrangements for local travel through the judge advocate or legal adviser for attendance of a witness who is stationed at an installation within the same judicial district, or not more than 100 miles from the place of testifying. Other requests will be referred to The Judge Advocate

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General in accordance with paragraph 7–4. The instructions from Headquarters, Department of the Army, or the request from the US Attorney or the attorney asserting the Government's claim, will serve as a basis for the issuance of appropriate travel orders by the local commander.

(3) *Travel and per diem expenses.* The witness' commander or supervisor should insure that the witness has sufficient funds to defray his expenses. The command judge advocate or legal officer will provide assistance as required.

(a) Where local travel is performed at the request of a US Attorney and the case does not involve an activity of the Army, the Government transportation request should be issued to the witness through the US Attorney making the request or by the US Marshal and per diem paid by the US Marshal. (Title 8, United States Attorneys Manual, pp 120–121.)

(b) The attorney asserting the Government's medical care claim under chapter 5 may be required to advance local travel expense money to the witness requested and to include these in recoverable costs where the Government's claim is not large enough to justify expenditures of Government travel funds.

(c) Other local travel and per diem expense for cases involving Army activities or claims is a proper expense of the command issuing the orders.

(d) Headquarters, Department of the Army, will furnish travel expense and per diem funds for other than local travel and will receive reimbursement from the Department of Justice or other Government agency as appropriate.

b. Witnesses for the District of Columbia.

(1) *Status of witness.* A military member authorized to appear as a witness for the District of Columbia will attend in a regular duty status. The status of a civilian employee will be determined in accordance with FPM 630.10–3.

(2) *Travel arrangements.* Travel arrangements will be made by the requesting agency direct with the witness or his commanding officer. Appropriate orders will be issued by the local commander when necessary.

(3) *Travel expenses.* The District of Columbia and the person sought as a witness will be informed that all arrangements for payment of travel and subsistence expenses, other than such monetary allowances for subsistence as may be normally furnished to enlisted personnel pursuant to Department of Defense Pay and Allowances Entitlements Manual (DODPM), chapter 1, will be made directly between the District of Columbia official and the prospective witness. An overseas commander may in his discretion, operations of the Department of the Army permitting, authorize the prospective witness to use, in travel outside the United States, military transport or military aircraft on a space-available basis without cost to the District of Columbia.

c. Witnesses for a State or private litigant.

(1) *Status of witness.* If authorized to appear as a witness for a State or private litigant, and the testimony to be given relates to information obtained in the performance of his regular, official duties, a military member may attend in a duty status. If authorized to appear as a witness but his testimony does not relate to information obtained in the performance of his regular, official duties, a military member may be granted a pass or administrative absence where appropriate under AR 630–5,or be required to take ordinary leave to attend. However, military members appearing as expert witnesses on behalf of a state or private litigant will be required to take ordinary leave. The status of a civilian employee will be determined in accordance with FPM 630.10–3. See a(1) above for status of witnesses in cases of medical care recovery claims under section II, chapter 5.

(2) *Travel arrangements.* Travel arrangements for attendance of military or civilian personnel authorized to appear as witnesses for a State or private litigant normally will be made by the requesting party with the individual concerned. Appropriate orders will be issued by the local commander when necessary.

(3) *Travel expenses.* Travel and subsistence expenses of the witness, other than such monetary allowances for subsistence as may normally be furnished to enlisted personnel

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pursuant to Department of Defense Pay and Allowances Entitlements Manual (DODPM), chapter 1, may not be paid by the United States. They are solely a matter between the witness and the party seeking his appearance. Witnesses ordinarily should be advised to require advance payment of such expenses. Military personnel authorized to appear in a pass, duty, or administrative absence status are not entitled to receive witness attendance fees, but may accept travel and subsistence expense money from the requesting litigant. All witness fees tendered the military member will be remitted to the Treasurer of the United States. A civilian employee authorized to appear in his official capacity will accept the authorized witness fees, in addition to the allowance for travel and subsistence, and make disposition of the witness fees as instructed by his personnel office (FPM 630.10–3*g*).

(4) *Space available travel.* Space available transportation may be utilized to the continental United States port of debarkation as authorized by paragraph 4–4, DOD 4515.13–R.

7–19. Witnesses before foreign tribunals. *a.* Requests or subpoenas from a foreign government or tribunal for military personnel and civilian employees stationed or employed within that country to be interviewed or to appear as a witness will be forwarded to the staff judge advocate of the command exercising general courts-martial jurisdiction over the unit to which the individual is assigned, attached, or employed. The staff judge advocate will determine whether—

(1) A consideration listed in paragraph 7–12 applies.

(2) The information requested is releasable under the criteria of section II.

(3) The approval of the American Embassy should be obtained because the person is attached to the Embassy staff or a question of diplomatic immunity otherwise may be involved.

b. If the judge advocate determines that the United States has an interest in the litigation (see para 7–2*c*), the commander may authorize the interview or order the individual's attendance in a temporary duty status with full entitlement to travel and per diem allowances. The United States will be presumed to have an interest in the litigation if it is bound by treaty or other international agreement to insure the attendance of such personnel.

c. If the judge advocate determines that the United States does not have an interest in the litigation, the commander may authorize the interview or the appearance of the witness in accordance with paragraphs 7–12*b* and 7–13*c*.

d. If the requested witness is stationed in the United States, the matter will be referred to The Judge Advocate General in accordance with paragraph 7–4. See 28 USC 1782.

DANIEL P. SCHRAGE

Professor, School of Aerospace Engineering at Georgia Tech, Atlanta, Georgia. January 1984 to Present: One of three universities set up as Centers of Excellence in Rotary Wing Technology.

July 1974 to January 1, 1984: Employed by U. S. Army. Major until 1978, civilian employee from 1978-1984. With the Army Aviation Systems Command, which procures U. S. Army aviation products, including helicopters.

1967 to 1974: Officer in U. S. Army. Rank: Second Lieutenant to Major.

Graduate of West Point 1967, General Engineering. Masters of Science, Georgia Tech 1974. Masters of Business Administration, Webster University, St. Louis, Missouri 1975. Doctor of Science, in Mechanical Engineering, Washington University, St..Louis, Missouri 1978.

Crawford Named '89 Nikolsky Lecturer

Charles Crawford, left, with John Zugschwert, accepting his Secretary of Defense Medal of Honor for Meritorious Civilian Service.

The AHS announced in February that Charles C. Crawford has been selected to deliver the 1989 Nikolsky Lecture at the 45th Annual Forum and Technology Display in Boston, May 22-24, 1989. Crawford will discuss "Rotorcraft Analytical Improvements Needed to Reduce Developmental Risk."

Crawford is currently the head of the Georgia Institute of Technology Research Institute's Aviation Technology Branch. He retired as Technical Director and Director of Research, Development, and Engineering for the U.S. Army Aviation Systems Command in 1988. Crawford was presented the Secretary of Defense Medal of Honor for Meritorious Civilian Service for his accomplishments during his 33 years in the government.

An AHS member since 1960, Crawford is on the Society's Board of Directors. He has served as President and Chairman of both the AHS and the Vertical Flight Foundation.

The Nikolsky Lectureship is given to an individual who reflects the highest ideals, goals, and achievements in the field of helicopter and V/STOL aircraft engineering and development. The selection of the lecturer is based on the individual's distinguished career, and his or her ability to compose an archival lecture document.

ATTACHMENT 3

[illegible]
ATTORNEYS AT LAW
303 FORT WORTH CLUB BUILDING
306 WEST 7th STREET
FORT WORTH, TEXAS 76102-4988
(817) 333-1391 METRO (817) 429-0861
TELECOPIER (817) 870-2427

OF COUNSEL
[illegible]

March 16, 1989

Mr. Robert Garfield
Chief, General Law Division
AVSCOM Legal Office, AMSAV-JR
4300 Goodfellow Blvd.
St. Louis, MO 63120-1798

Re: Cause No. 68,282-C; Beavers v. Bell Helicopter Textron Inc.

Dear Mr. Garfield:

Pursuant to the regulations of the Department of Defense, I am requesting authorization for Dan Schrage to testify by deposition and at trial in the above-styled case.

This case arises out of an accident which occurred on February 15, 1985 involving a JAH-1S helicopter at Fort Rucker, Alabama. The accident investigation determined that the cause of the accident was the failure of the swashplate bearing due to increased thrust loads. Thereafter, there was a message from AVSCOM requesting the examination of all swashplate bearings on the AH-1S. Procedures for overhaul, inspection, and maintenance of the swashplate assembly, I am told, were subsequently changed.

Bell Helicopter has been sued, along with Northrop Worldwide Aviation Systems, in the above-styled case in the state court in Amarillo, Texas. The Plaintiffs have thus far claimed a design defect in the swashplate assembly, but have not been specific in their claims.

The United States is not a party, and I know of no claim any person intends to assert in this case against the United States government.

Dan Schrage has agreed to assist Bell as an expert witness in the defense of this case. He was not involved in the accident investigation, and I am not aware that he has any confidential information related to the accident investigation.

Mr. Schrage would be asked to testify concerning the historical development and participation of AVSCOM in the design and

ATTACHMENT 4

manufacturer of the AH-1 helicopter from its AH-1G configuration in the mid-to-late '60's to its AH-1S configuration with Kaman blades in the 1980's. In this respect, Mr. Schrage's knowledge would be relevant to the issue of the military contractor defense, showing the knowledge of the military of the components used on the AH-1 helicopter.

Mr. Schrage would also be asked to testify based upon independent expertise concerning the suitability of the AH-1S swashplate assembly in its present configuration for use on the AH-1 helicopter with Kaman blades. He has not yet done this analysis, but we have asked him to assist us.

I would appreciate your prompt attention to this request. THIS IS A VERY OLD CASE. IT COULD BE SET FOR TRIAL ANYTIME. WE NEED YOUR RESPONSE AS SOON AS POSSIBLE.

I look forward to your response. If you need any further information, do not hesitate to call me.

Very truly yours,

R. David Broiles

RDB:smb

cc: Mr. Dan Schrage

avscom-ltr d4
\drive2\usr\sylvia\beavers

ATTACHMENT 4

BI .VN, HER; 1AN, SC. . T, DEAN & MILL
ATTORNEYS AT LAW
FORT WORTH, TEXAS 76102

March 16, 1989

Mr. Robert Garfield
Chief, General Law Division
AVSCOM Legal Office, AMSAV-JR
4300 Goodfellow Blvd.
St. Louis, MO 63120-1798

Re: Cause No. 68,282-C; Beavers v. Bell Helicopter Textron Inc.

Dear Mr. Garfield:

Pursuant to the regulations of the Department of Defense, I am requesting authorization for Charles C. Crawford to testify by deposition and at trial in the above-styled case.

This case arises out of an accident which occurred on February 15, 1985 involving a JAH-1S helicopter at Fort Rucker, Alabama. The accident investigation determined that the cause of the accident was the failure of the swashplate bearing due to increased thrust loads. Thereafter, there was a message from AVSCOM requesting the examination of all swashplate bearings on the AH-1S. Procedures for overhaul, inspection, and maintenance of the swashplate assembly, I am told, were subsequently changed.

Bell Helicopter has been sued, along with Northrop Worldwide Aviation Systems, in the above-styled case in the state court in Amarillo, Texas. The Plaintiffs have thus far claimed a design defect in the swashplate assembly, but have not been specific in their claims.

The United States is not a party, and I know of no claim any person intends to assert in this case against the United States government.

Charles C. Crawford has agreed to assist Bell as an expert witness in the defense of this case. He was not involved in the accident investigation, and I am not aware that he has any confidential information related to the accident investigation. He is familiar with the subsequent activities of AVSCOM, which are public information, and which have been provided to me through document production by AVSCOM.

ATTACHMENT 5

Mr. Crawford would be asked to testify concerning the historical development and participation of AVSCOM in the design and manufacturer of the AH-1 helicopter from its AH-1G configuration in the mid-to-late '60's to its AH-1S configuration with Kaman blades in the 1980's. In this respect, Mr. Crawford's knowledge would be relevant to the issue of the military contractor defense, showing the knowledge of the military of the components used on the AH-1 helicopter.

Mr. Crawford would also be asked to testify based upon independent expertise concerning the suitability of the AH-1S swashplate assembly in its present configuration for use on the AH-1 helicopter with Kaman blades. He has not yet done this analysis, but we have asked him to assist us.

I would appreciate your prompt attention to this request. THIS IS A VERY OLD CASE. IT COULD BE SET FOR TRIAL ANYTIME. WE NEED YOUR RESPONSE AS SOON AS POSSIBLE.

I look forward to your response. If you need any further information, do not hesitate to call me.

Very truly yours,

R. David Broiles

RDB:smb

cc: Mr. Charles C. Crawford

avscom-ltr d4
\drive2\usr\sylvia\beavers

ATTACHMENT 5

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

March 30, 1989

Litigation Division
General Litigation Branch

R. David Broiles, Esquire
Brown, Herman, Scott, Dean & Miles
203 Fort Worth Club Building
306 West Seventh Street
Fort Worth, Texas 76102-4988

Dear Mr. Broiles:

This letter responds to your written request to depose and for the possible testimony of Messrs. Dan Schrage and Charles C. Crawford as expert witnesses in the case of Beavers v. Bell Helicopter Textron, Inc. For reasons expressed below, your request is denied.

Both present and former Department of the Army personnel and civilian employees are allowed to appear as expert witnesses in private litigation only under the most extraordinary circumstances. There are a number of compelling reasons for exercising strict control over such witness appearances.

The policy of the Army is one of strict impartiality in litigation in which the Army is not a named party, a real party in interest, or in which the Army does not have significant interest. When a witness with an official connection with the Army testifies, there is a natural tendency to assume that the testimony represents the official views of the Army, even where there are express disclaimers to the contrary.

The Army is also interested in preventing the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities. When Army personnel testify as expert witnesses in such unrelated litigation, their official duty performance is invariably disrupted, often at the expense of the Army's mission accomplishment and the federal taxpayer.

ATTACHMENT 6

Finally, the Army is concerned about the potential for conflict of interest inherent in the unrestricted appearance of its personnel as expert witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust in the integrity of our Government.

In this case, the extraordinary circumstances required for an exception to Army policy are not met. Accordingly, your request is denied.

If you have any questions, please call me at (202) 697-3462.

Sincerely,

John P. Galligan
Lieutenant Colonel, U.S. Army
Chief, General Litigation
Branch

Copy Furnished:

Commander
U.S. Aviation Systems Command
ATTN: AMSAV-JR (CPT Jakubowski)
4300 Goodfellow Boulevard
St. Louis, Missouri 63120-1798

ATTACHMENT 6

BEALS DEAN
RICHARD E. MILES
JAMES T. BLANTON
R. DAVID BROILES
J. LYNDELL HINKLEY
GRANT LISBA
MORTON L. HERMAN
STEPHEN C. HOWELL
RICHARD W. WISEMAN
JOHN G. TRUELSCH
JOHN D. MEDIN
RANDALL L. SCHMIDT
LARRY E. COTTEN
DENNIS M. CONRAD
JOHN W. PROCTOR
BRIAN D. EBERWEIN

BROWN, HERMAN, SCOTT, DEAN & MILES
ATTORNEYS AT LAW
203 FORT WORTH CLUB BUILDING
306 WEST 7th STREET
FORT WORTH, TEXAS 76102-4988
(817) 333-1391 METRO (817) 429-0861
TELECOPIER (817) 870-2427

PATRICIA L. SMITHSON
D. LEE GWIN
DAVID A. LOWRANCE
LARRY W. WILSHIRE
SANDRA COCHRAN
PAUL E. HANSON

OF COUNSEL
ARDELL M. YOUNG
GEORGE GALERSTEIN

JESSE M. BROWN (1893-1979)
A. W. HERMAN (1905-1967)
JOHN M. SCOTT (1911-1985)
WILLIAM M. BROWN (1912-1987)

June 13, 1989

COPY

John P. Galligan
Lieutenant Colonel, U. S. Army
Chief, General Litigation Branch
Department of the Army
Office of the Judge Advocate General
Washington, D.C. 20310-2200

Re: Beavers v. Bell Helicopter Textron Inc., et al--Testimony of Charles C. Crawford and Daniel Schrage

Dear Lt. Colonel Galligan:

Attached find two letters from me dated March 16, 1989 to the AVSCOM Legal Office, requesting permission for the testimony of Charles C. Crawford and Daniel Schrage. Also attached find your response of March 30, 1989.

Please consider this a renewed request for the testimony of Charles Crawford and Dan Schrage. However, I will change my request made March 16, 1989 to eliminate the request that they be able to testify based upon their independent expertise, or any calculations or investigations they would make, concerning the cause of this accident.

Basically, Mr. Crawford and Mr. Schrage have personal knowledge from their employment at AVSCOM of the selection, testing, qualification, and installation of the Kaman 747 rotor blades on the AH-1 helicopters. They also have historical knowledge of the development of the AH-1 helicopter. Their testimony is relevant to the issue of the military contractor defense.

We would offer their testimony to show that they (1) had knowledge of the specifications for the AH-1 helicopter, (2) were involved in approving those specifications, and (3) knew of any dangers associated with the design of those specifications relevant to the issues in this lawsuit.

Secondly, we would offer evidence that they knew of the selection of the Kaman blades; they knew that it increased loads on flight control components; and that the Army approved that blade for the AH-1 helicopter.

ATTACHMENT 7

Both men are experts. Their opinions, formed during the course of their employment with the military are relevant to the decisions made by the United States Army in the procurement of equipment related to this lawsuit. We request this testimony in order to be able to establish the military contractor defense.

If you have any further questions about the purpose of this testimony, I would appreciate it if you would call me. I again request that these two gentlemen be allowed to testify in this case. We will pay them their regular fee for consultation purposes. However, we will not request that they make any additional investigation as expert witnesses on our behalf.

Very truly yours,

R. David Broiles

RDB:smb
Attachments

cc: Mr. Charles C. Crawford
Mr. Daniel Schrage

ltr-army d4
\drive2\usr\sylvia\beavers

ATTACHMENT 7

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

June 20, 1989

REPLY TO
ATTENTION OF

Litigation Division
General Litigation Branch

R. David Broiles, Esquire
Brown, Herman, Scott, Dean & Miles
306 West Seventh Street
Fort Worth, Texas 76102-4988

Dear Mr. Broiles:

This responds to your renewed written request of June 13, 1989, to depose Messrs. Charles C. Crawford and Dan Schrage in the case of Beavers v. Bell Helicopter Textron, Inc., et al. We have considered the arguments contained in your recent correspondence; however, we adhere to the reasons enunciated in our earlier letter on this subject. Accordingly, your request is denied.

If you have any questions, please call me at (202) 697-3462.

Sincerely,

John P. Galligan
Lieutenant Colonel, U.S. Army
Chief, General Litigation
Branch

Copy Furnished:

Commander
U.S. Army Aviation Systems Command
ATTN: AMSAV-JR (CPT Jakubowski)
St. Louis, Missouri 63102-1798

ATTACHMENT 8

LAW OFFICES
McKENNA, CONNER & CUNEO
1575 EYE STREET, N.W.
WASHINGTON, D. C. 20005
(202) 789-7500
CABLE ADDRESS: MCKENCONN WASHDC
TELEX (TWX) 710-822-0149
TELECOPIER (202) 789-7604

LOS ANGELES
444 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071
(213) 687-9000

SAN FRANCISCO
STEUART STREET TOWER
ONE MARKET PLAZA
SAN FRANCISCO, CALIFORNIA 94105
(415) 543-3804

ORANGE COUNTY
575 ANTON BOULEVARD
COSTA MESA, CALIFORNIA 92626
(714) 432-8338

DENVER
1670 BROADWAY, SUITE 300
DENVER, COLORADO 80202
(303) 830-0700

August 30, 1989

HERBERT L. FENSTER

Gary Cross, Esq.
Peter Sherman, Esq.
Counsel for Aerospace Industries Association of America, Inc.
Dunaway & Cross
1146 19th Street, N.W.
Fourth Floor
Washington, D.C. 20036

Stephen Bokat, Esq.
Vice President
National Chamber Litigation Center
Chamber of Commerce of the United States
1615 H Street, N.W.
Washington, D.C. 20062

George Galerstein, Esq.
Counsel for Bell Helicopter Textron, Inc.
Brown, Herman, Scott, Dean & Miles
203 Fort Worth Club Building
306 West 7th Street
Fort Worth, Texas 76102-4988

Michael Hoenig, Esq.
Counsel for The Product Liability Advisory Council, Inc.
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005

Re: Trevino v. General Dynamics

Gentlemen:

Pursuant to Supreme Court Rule 36.1, defendant/petitioner General Dynamics Corporation consents to your filing on behalf of your respective clients, a brief of amicus curiae in support of its Petition for Writ of Certiorari.

Herbert L. Fenster

Herbert L. Fenster, Esq.
Counsel for Petitioner General Dynamics Corporation
McKenna, Conner & Cuneo
1575 Eye Street, N.W.
Washington, D.C. 20005

HLF/mpk

ATTACHMENT 9

FISHER, GALLAGHER, PERRIN & LEWIS
ATTORNEYS AT LAW
70th FLOOR
FIRST INTERSTATE BANK PLAZA
1000 LOUISIANA
HOUSTON, TEXAS 77002
(713) 654-4433
FAX (713) 654-5070

September 15, 1989

Mr. Gary Cross
Mr. Peter Sherman
Counsel for Aerospace Industries
Association of America, Inc.
Dunaway & Cross
Fourth Floor
1146 19th Street, N.W.
Washington, D.C. 20036

Mr. George Galerstein
Counsel for Bell Helicopter Textron, Inc.
Brown, Herman, Scott, Dean & Miles
203 Fort Worth Club Building
306 West Seventh Street
Fort Worth, Texas 76102-4988

Mr. Stephen Bokat
Vice President
National Chamber Litigation Center
Chamber of Commerce of the United States
1615 H Street, N.W.
Washington, D.C. 20062

Mr. Michael Hoenig
Counsel for The Product Liability
Advisory Council, Inc.
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005

Re: Trevino v. General Dynamics

Gentlemen:

Pursuant to Supreme Court Rule 36.1, plaintiffs/respondents Gloria Trevino, et al., consent to your filing on behalf of your respective clients a brief of amicus curiae in support of defendant/petitioner General Dynamics Corporation's

ATTACHMENT 10

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

David W. Holman

David W. Holman
Counsel for Respondent
Gloria Trevino, et al.
Fisher, Gallagher, Perrin & Lewis
70th Floor
First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002

DWH/jwd
WPLTRS

ATTACHMENT 10

(5)

No. 89-376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION, PETITIONER,

v.

GLORIA TREVINO, ET AL., RESPONDENTS,

On Petition For a Writ of Certiorari to the United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

MICHAEL HOENIG*
AARON D. TWERSKI
DANIEL V. GSOVSKI
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500
Attorneys for
The Product Liability
Advisory Council, Inc.

*Counsel of Record

23 pp

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TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-376

GENERAL DYNAMICS CORPORATION, PETITIONER

v.

GLORIA TREVINO, ET AL., RESPONDENTS

On Petition For a Writ of Certiorari to the United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC" or "Advisory Council") is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Acts of 1983.[1] Its principal purpose is the submission of appellate briefs, as friend of the court, in cases raising significant issues affecting substantive and procedural law in the area of product liability.

Member companies of PLAC, as well as other products manufacturers throughout the nation, often enter into contracts with the United States government in order to supply products used by the military. Some members manufacture parts and components to be incorporated in complex military products.

1. The members of PLAC are listed in the Appendix.

These companies, of course, are directly affected by the potential for still another form of expansive and open-ended products liability.

PRELIMINARY STATEMENT

Amicus adopts Petitioner General Dynamics' Statement of the Case. However, it is important to identify certain features in the record and the proceedings which underscore the policy considerations addressed by *Amicus* PLAC in this brief. In particular, the views of the United States in the *Trevino* litigation are relevant.

1. The *Trevino* claims were tried during the period October 21-24, 1985. The conversion work on the submarine GRAYBACK occurred during the period 1966-1968. The fatal accident occurred in January 1982.

2. Following trial, the plaintiffs were awarded a total of $4.25 million in damages by the district court against General Dynamics. *Petition*, at 4.

3. The two contracts awarded by the Navy to General Dynamics for the conversion work on GRAYBACK were plaintiffs' trial exhibits 1 and 2. The contract prices for each respectively were $561,565 and $354,895 for a total of $916,460. (A third contract in the amount of $589,208 did not appear relevant to the work performed in connection with the GRAYBACK. See U.S. Post-Trial Brief, at 1-2).

4. Plaintiffs' claims against the defendant United States were dismissed by the trial court on October 23, 1985. At the trial court's request, the United States filed a "Post-Trial Brief" addressing, *inter alia,* the "public policy considerations relating to this action." In its post-trial brief, the United States stated:

> "There can be no question, however, that whatever General Dynamics' degree of participation in the design decisions which led to the construction and installation of the

> chamber on GRAYBACK, *the basic design for such a chamber was the Navy's.*" Post-Trial Brief of Defendant/Cross-Defendant United States, p. 9 (Nov. 25, 1985) [emphasis supplied].

5. The United States urged that the "evidence adduced at trial" indicated that the contractor's "*only involvement with the design*" was to assist Naval Shipyard design personnel "*to produce the working drawings* for the chamber to be built by the government at Mare Island." U.S. Post-Trial Brief, at 9. The "*specifications* from which the working drawings were produced *originated with the Navy.*" *Id.* at 9 [emphasis supplied]. It was "the responsibility of Mare Island Naval Shipyard *to check and approve each drawing* before it was issued to the shipyard production shops for work on GRAYBACK." *Id.* at 9-10 [emphasis supplied].

6. According to the United States, "as a matter of fact . . . as well as a matter of contract *the responsibility for the design work* performed by General Dynamics for the GRAYBACK conversion *was that of the Navy.*" U.S. Post-Trial Brief, at 10 [emphasis supplied].

7. According to the United States, "*the specifications,* the circular of requirements (COR) under which General Dynamics undertook to assist the Navy in the design of the lock-out/lock-in chamber for GRAYBACK, *were established by the government and were not subject to negotiation.*" U.S. Post-Trial Brief, at 14 [emphasis supplied]. The contractor "merely assisted in completing a design *subject to government approval.*" *Id.* at 14 [emphasis supplied]. The United States viewed the argument that the contractor exercised some independent judgment in assisting with the design as "the type of 'continuous back and forth' discussion between the contractor and the Navy, with the Navy making all final decisions," as required by then-existing case law on the government-contractor defense. *Id.* at 14 (citing *Koutsoubos v. Boeing Vertol,* 755 F.2d 352, 355 (3d Cir.), *cert. denied,* 474 U.S. 821 (1985).

8. According to the United States, the evidence showed that "the circular of requirements prepared by the Navy provided a reasonably precise formulation of the chamber to be built on the GRAYBACK," from which neither the Naval Shipyard nor the contractor had discretion to deviate, but as to which both could "suggest modifications" in the process of producing the working drawings. U.S. Post-Trial Brief, at 16. The contractor's "product," the working drawings, was not produced independently of the Navy in response to specifications, but "*was produced under Navy supervision and was subject to Navy approval.*" *Id.* at 19 [emphasis supplied]. "The concept, original specifications, design, implementation, training, maintenance, and method of use were all originated and/or approved by the Navy." *Id.* at 20.

9. In the appeal to the Fifth Circuit, the United States asserted the trial court's error in placing improper conditions on the sort of government "approval" that can trigger the government contractor defense, in effect, engaging in "judicial second-guessing of military decisions" that the defense was meant to avoid. Brief for Appellee The United States in U.S. Court of Appeals, at 18, 40-46 (May 1987).

10. Following the decision of this Court in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), the United States submitted a letter brief to the Fifth Circuit, pursuant to that court's request, asserting that *Boyle* "fully supports the position we have taken previously in this case, and requires a reversal of the district court's rejection of the defense as applicable here . . ." Letter Brief of Appellee United States to Fifth Circuit, at 1 (Aug. 15, 1988). The government stated:

> "[T]he Navy's decisions as to how thoroughly to review any design aspects that were developed by General Dynamics, and its decisions regarding how much expertise to bring to bear on this exercise, were part and parcel of its plainly discretionary decision to approve the final specifications. Accordingly, a rule designed to protect the federal

interest embodied in the 'discretionary function' exemption (*Boyle,* 108 S. Ct. at 2518) must be based simply on the fact of the government's approval of precise specifications, without intrusion into the character or details of that approval. Since there is no serious question in this case that the Navy indeed approved the final plans (*see* Brief of Defendant-Appellant General Dynamics Corp., filed March 26, 1987, at 12-14), General Dynamics has met this element of the *Boyle* test." U.S. Letter Brief, *Id.* at 7-8.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's *Trevino* decision conflicts with the letter and spirit of the contractor defense approved by this Court in *Boyle* and also conflicts with the position of the United States throughout the litigation. However, its inherent weakness goes far beyond that. *Trevino* is based upon vague and amorphous legal guidelines which, when parsed and reviewed, offer the trial bench and bar no clarity in application. On the contrary, instead of protecting "uniquely federal interests," *Trevino's* legal criteria would promote a quagmire that literally invites pretrial discovery and litigation, pursuant to state tort rules, as to nonjusticiable issues such as highly polycentric military decision-making and the level of "knowledge," "qualifications," "competence" and thought processes of federal officers charged with "approving" military equipment designs. In addition, the *Trevino* decision suffers from grave internal inconsistencies that taint the result reached.

TREVINO'S VAGUE LEGAL GUIDELINES CONFLICT WITH *BOYLE,* ENCOURAGE TORT LITIGATION REGARDING NONJUSTICIABLE ISSUES OF MILITARY COMPETENCE AND SUFFER FROM MAJOR INTERNAL INCONSISTENCIES.

In *Boyle v. United Technologies Corp.,* 108 S. Ct. 2510, 2518 (1988), this Court approved a limited "military contractor defense" in order to achieve "uniquely federal interests" and

held that "[l]iability for design defects in military equipment cannot be imposed, pursuant to state law," when the following three conditions are met:

> (1) the United States approved reasonably precise specifications;
>
> (2) the equipment conformed to those specifications; and
>
> (3) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States.

The dissenting Justices in *Boyle* clearly understood that the limited defense formulation was nevertheless "breathtakingly sweeping," 108 S. Ct. at 2520 (Brennan, J., dissenting), to be applied even "regardless of how blatant or easily remedied the defect, so long as the contractor missed it and the specifications approved by the government, however unreasonably dangerous, were 'reasonably precise'." *Ibid*

In *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), retired Associate Justice Lewis F. Powell, Jr., sitting by designation and writing for the panel, called the *Boyle* ruling a "broad fomulation" of the government contractor defense. *Id.* at 1315. The three conditions listed above "ensure that the defense operates to immunize the contractor only where the government has actually participated in discretionary design decisions, either by designing a product itself or approving specifications prepared by the contractor." *Id.* at 1316.

The underpinning which led this Court in *Boyle* to invoke federal common law in this area of "uniquely federal interest" was the "discretionary function" exception to the Federal Tort Claims Act. *Boyle*, 108 S. Ct. at 2514-1518. Without the defense, the government's own tort immunity for its discretionary functions would be undermined. Contractors held liable for design features that were the subject of discretionary approval by the government would "predictably pass on the

costs of liability ultimately imposing costs on the government that its immunity was intended to preclude." *Harduvel v. General Dynamics Corp., supra,* 878 F.2d at 1315.

In the military context, the immunity also serves the "further important purpose" of "shielding sensitive military decisions from scrutiny by the judiciary." *Id.* at 1316. Application of ordinary tort law to military design and procurement decisions is "inappropriate" since defense "exigencies" may require incurring "risks beyond those that would be acceptable for ordinary consumer goods." *Ibid.* Moreover, since the government contractor defense is a matter of federal common law, state law should not operate "either to defeat the defense or to expand it improperly" so that the defense "could not be applied with the uniformity that is a key justification for application of federal common law." *Id.* at 1317.

A. *Trevino's Vague and Conflicting Guidelines*

In *Trevino v. General Dynamics Corp.,* 865 F.2d 1474 (5th Cir.), *reh'g denied en banc,* 876 F.2d 1154 (5th Cir. 1989), the Fifth Circuit panel decision has undermined the *Boyle* defense by "effectively rewrit[ing]" this Court's test for contractor design immunity and imposing new, formalistic legal conditions which inevitably must thrust trial courts into scrutiny of the most delicate and sensitive thought processes of government officials charged with weighing polycentric design decisions. See *Trevino,* 876 F.2d at 1155-1157 (Jolly J., dissenting from denial of rehearing *en banc*).

Trevino also eviscerates the legal defense by creating innumerable fact issues upon which government contractor litigation inevitably must mushroom beyond the summary judgment stage. Lack of uniformity and uncertainty are promoted. Here, in part, is how *Trevino* accomplishes these results:

Trevino's legal guidelines say that:

1) government "approval under the defense must constitute a discretionary function." 865 F.2d at 1480;

2) "case law defin[es] the *notion* of a 'discretionary function'." *Ibid.* [emphasis supplied] It is "a rich case law," involving policy balancing between competing purposes, *Id.* at 1483-1484, and courts have found it "impossible" to define "with precision every contour of the discretionary function exception." *Id.* at 1484;

3) discretionary functions are "only those that involve the use of policy judgment." *Id.* at 1480;

4) government "approval" of design requires its "substantive review or evaluation." *Ibid.;*

5) in a case like *Trevino,* the "trier of fact will determine whether the government has exercised or delegated to the contractor discretion over the product design." *Ibid.;*

6) the government exercises its discretion when "it actually chooses a design feature." *Ibid.;*

7) "critical design decisions" may not be left to the private contractor. *Ibid.;*

8) when contracting out the design of a concept generated by the government, the United States may not require "only that the final design satisfy minimal or general standards established" by it. *Ibid.;*

9) exercise of government discretion "does not revert to the government by the mere retention of a right of 'final approval' of a design." *Ibid.;*

10) government "approval" of the design must be with a "substantive review or evaluation of the relevant design features." *Ibid.;*

11) "a review to determine that the design complies with the general requirements initially established by the government" is insufficient. *Ibid.;*

12) "the mere signature of a government employee on the 'approval line' of a contractor's working drawings,

without more, does not establish the government contractor defense." *Ibid.;*

13) although the "trier of fact should not evaluate the wisdom or quality of any government decision" it must "locate the actual exercise of the discretionary function." *Ibid.;*

14) the government contractor may not exercise the "actual discretion over the defective feature of the design." *Ibid.;*

15) approval of "reasonably precise specifications" means that the "discretion over significant details of all critical design choices will be exercised by the government." *Id.* at 1481;

16) the *Boyle* Court's use of the terms "approved" or "considered by a Government officer" [108 S. Ct. at 2518] "is unfortunate." 865 F.2d at 1481 n. 7;

17) "the government's cognizance of the relevant design features must be on a par with that of the government contractor." *Id.* at 1481 n. 7;

18) "At a minimum, the federal officer approving the design must not only sign it but know what is there." *Id.* at 1481 n. 7;

19) the federal officer signing the design approval must "review" or "understand the specifications" or "care whether the contractor deviated from them." *Id.* at 1481;

20) the purpose of the "approval" test "is to deny the defense to a government contractor 'that is ultimately responsible for the design defect.' " *Ibid.*;

21) "If the government has chosen to delegate its design discretion to a private contractor, however, the government does not exercise a discretionary function by merely approving the contractor's work." *Id.* at 1485;

22) "once the government has delegated authority to the private contractor to make important choices, the government does not exercise a discretionary function by merely accepting the contractor's work." *Id.* at 1485;

23) "although the government's decision to delegate its discretion on a matter to a private contractor is itself a discretionary function, that is not the discretion with which the government contractor defense is concerned." *Id.* at 1485 n. 10;

24) "The discretionary function at issue in the government contractor defense is that discretion involved in 'selecti[ng] the appropriate design for military equipment to be used by our armed forces.' " *Id.* at 1485 n. 10;

25) the *Boyle* defense protects government contractors "if discretion over the design feature in question was exercised by the government." If the government "delegates its discretion" to the contractor "and allows the contractor to develop the design," the defense does not apply; "mere acceptance" of the contractor's work does not provide a defense "unless there is approval based on substantive review and evaluation of the contractor's design choices." *Id.* at 1486.

Merely restating the foregoing 25 *Trevino* postulates of a so-called "defense" reveals a daunting hodgepodge of vague, ambiguous and internally inconsistent legal criteria. They raise more questions than they answer. For example, considering the *Trevino* facts, what really is a "discretionary function"? Does a conscious decision by the government over 13 years of use that training skilled submariners to avoid the dangers of a vacuum is a sufficient safety precaution constitute the government's "exercise of discretion"? Is this not a "policy judgment"? Is a review and approval of design drawings by a designated officer appointed for the purpose not a "substantive review or evaluation"? What are "critical design decisions"? Was there not a "substantive review or evaluation of the relevant design features"? Did the government really not exercise "discretion over significant details of all critical design choices"? Which details were not "significant"? Which design choices were not "critical"? Is it impossible here to "locate the actual exercise of the discretionary function"? Were design aspects not "considered" by the government? Was there no government "cognizance of

relevant design features"? Did the approving federal officer "not know what is there"? Or not "understand the specifications"? Did the government not "select" the design at issue?

Trevino's legal "guidelines" offer absolutely no clear, rational guidance by which to apply *Boyle's* contractor defense. Instead, contracting parties such as the United States and its suppliers are provided elusive guidelines that are at odds with the realities of day-to-day, continuous "back-and-forth" operations and decision-making in the laboratories, shops, factories and field where military equipment is designed, built, perfected and used.

Moreover, juries struggling to evaluate factual issues involving submarines, fighter aircraft, helicopters and the like cannot hope to fathom jury instructions fashioned out of *Trevino's* melange of imprecise standards. Further, even trial judges must inevitably become vexed by appellate legal standards that literally invite denials of merited summary judgments because innumerable questions of fact about "discretion" are artificially raised regarding the intelligence, motives, experience and training of government officers. Who will not be able to "second guess" the relative "experience" of a young, recent engineering graduate designated as the Navy's design review officer? Or even the time he spent on the task in light of other assignments? Must all government review officials be on a par with an Albert Einstein or rocket expert Werner von Braun? And who is to say that even these scientific luminaries would be more competent, skilled or safety-conscious about the conversion of a submarine than the officer actually selected for the task? Yet these are the kinds of questions *Trevino* inevitably invites.

Trevino is little more than a decision desperately in search of a rationale. The trial ensued well before the *Boyle* decision. Despite unequivocal pronouncements by the United States about its true pivotal and critical role in the design approval

process [see *Preliminary Statement, supra* at 2-5], the trial judge entered a $4.25 million judgment against the contractor some 17 years after it had completed its drafting work for the government's conversion of a submarine at a contract price that was but a fraction of the liability imposed. In such a setting and given the *Trevino* panel's amorphous legal guidelines, which contractor in today's liability world would risk open-ended liability of unlimited duration for a modest price? Little wonder that the United States has repeatedly expressed grave concerns in this case over the distortion of fact as well as the policy problems involved in bypassing the contractor defense.

B. *Internal Inconsistencies*

Trevino's conflict with the letter and spirit of the *Boyle* defense has already been clearly established. *Trevino,* 876 F.2d at 1155-1157 (Jolly J., dissenting from denial of rehearing *en banc*); see also Petition of General Dynamics herein, at 7-19; Brief of *Amicus* Aerospace Industries Association of America, Inc., in support of Petition, at 2-9. We will not repeat the major points made in these cogent analyses.

However, we also note that *Trevino* presents significant internal inconsistencies that undercut the wisdom of its newly-minted legal tests. For example, the Fifth Circuit panel states:

> "It is not for the court to undertake to evaluate the quality of the government's review. The only factual question is whether the government actually exercised design discretion. If the government intended to exercise its discretion over the design of a product and a government official undertakes to substantially review, evaluate, and then approve the design, the first element of the *Boyle* test is satisfied *even if the government official doing the review was incompetent or negligent." Trevino,* 865 F.2d at 1486-1487 n. 12 [emphasis supplied]

Yet, in the very next breath the panel says that "the government's use of clearly unqualified individuals to review and approve highly technical design work" may nevertheless be

"evidence that the government does not intend to exercise design discretion but is merely rubber-stamping the contractor's design specifications. That seems to be the case here." *Id.* at 1487 n. 12.

The court cannot have it both ways. It cannot pay lip service to a rule against questioning the competence, qualifications or negligence of a government review officer but nevertheless authorize scrutiny of those very same qualifications, competence and knowledge under the rubric of purported "evidence." Such a "rule" is not rule at all. It sends conflicting signals to the trial bench and bar and authorizes, instead, "witch hunt" investigations into the mental prowess of federal officials.

Moreover, there should be no illusions about the real world impracticalities of such an approach. There is simply no way of determining whether the military fully considered the alternative designs and permutations thereof without analyzing the way military decisions are made and probing the values which the military ascribes to each of the risk-utility factors involved in design decisions. Under *Trevino* it will be to plaintiff's advantage in each case to question the level of the military's relevant "knowledge and expertise" or the qualifications and competence of federal "approvers." Thus, plaintiff's lawyers will question both the competence and the value structure of military decision-making in order to establish that *in fact the military made no decision,* or exercised *no "discretion,"* as *Trevino* puts it.

On the other hand, defendant contractors, in attempting to show that the military did in fact knowingly reject a whole host of design alternatives, will argue that the military had already made a set of *a priori* decisions to live with a given level of risk than to better the performance of the equipment. Contractors will necessarily have to examine the values behind military decision-making in order to demonstrate that the military did,

in fact, *decide to disregard alternative designs or did exercise "discretion,"* as *Trevino* puts it. In practical terms, of course, all this would potentially require extensive pretrial discovery of government employees, managers and innumerable documents upon subjects of possible sensitivity or national security. The result would be involvement of key government officials in private litigation, despite immunity from liability, thereby diverting officials from security tasks on pending and future military projects. Were such discovery unavailable, the unfairness to the contractor is manifest.

The consequences of such hair-splitting inquiries and discovery problems in a given case should be well-understood. The fault of the military, even if substantial, will play no role in the case. The desire of the military to short-circuit the design development process will be of no moment. The defendant contractor will bear the full brunt of liability. The government, being immune from suit, will bear no percentage of the harm. The doctrine of joint and several tort liability, which still governs in the large majority of jurisdictions, will impose the full cost of the injury upon the government contractor. The Second Circuit, in its ringing endorsement of the government contractor defense before *Boyle,* took careful note of the harsh impact of judgments in military contractor cases:

> "[T]he government cannot be sued and need not even cooperate with the contractor in defending personal injury litigation. Obtaining discovery from the government as a non-party might be difficult or even barred by a claim of national security privilege. The military contractor thus faces the great exposure of being the sole deep pocket available." *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 187, 191 (2d Cir. 1987), *cert. denied sub nom. Lombardi v. Dow Chemical Co.,* 108 S. Ct. 2898 (1988).

Furthermore, questions about the experience, knowledge, training or qualifications of military officials reviewing designs will not be merely an isolated, remote possibility. After all,

contractors are often chosen *because* their level of expertise on the particular subject far surpasses that of the military. *Trevino,* however, strongly suggests that the government's establishment of "minimal or general standards" followed by "approval" of the emergent design is not sufficient [865 F.2d at 1480] and that the reviewing official must "understand the specifications" [865 F.2d at 1481] and that the "government's cognizance of the relevant design features *must be on a par with* that of the government contractor" [865 F.2d at 1481 n. 7 [emphasis supplied]]. These *Trevino* formulations must require interrogating counsel's inquiry into the "expertise," "knowledge," "understanding," "cognizance" and "qualifications" of government review officers. Nothing in *Boyle* sanctions such an open-ended litigation scheme. On the contrary, *Trevino* is thus at odds with the realities of the government's frequent desire to actually select contractors *with superior expertise* in order to overcome the government's void of knowledge.

The capabilities of a bidding contractor for technological innovation and conceptual creativity are factors that must enter into the contractor selection process. For products with which the military has long-term experience, less weight may be placed on these factors, with greater weight placed on such factors as past performance and timeliness of delivery. In products which require greater technical innovation, the military may opt for a contractor with better research and development capabilities or with proven experience or skill in the field. Sometimes, "time is of the essence," as it was in *Trevino,* so superior knowledge by the contractor is a premium need. These choices of relative contractor strengths are highly political in nature and go to the very heart of military discretion. Yet, by inviting attacks on government "approvals" which arguably fall short of some *post-hoc,* hindsight judicial standard of requisite government "knowledge" or "understanding" of "critical" design features, *Trevino* actually penalizes the "expert" manufacturer for possessing superior skill. It does so by

denying the contractor the defense announced in ***Boyle***. Such a bizarre result could not have been intended by this Court. If the military has an absolute right to purchase equipment from whom it sees fit and when it sees fit, then a government contractor cannot be penalized for possessing the superior expertise and knowhow that inherently makes the review official's "cognizance" *not* "on a par" with the contractor's.

Nor should the problems of the time frame dimension be underestimated. Complex military products are often used for extended periods under conditions established solely by the military. An injury may occur many years after the contractor's work was completed. Then, there is a natural "tail" between the time of injury and the time of suit. This is followed by a further delay until the time of trial. Pretrial discovery and investigations into the mental powers, competence and qualifications of design review officers may involve exquisite inquiries into levels of knowledge possessed decades earlier by persons whose assignments were totally under military control and discretion. Pretrial investigation and discovery — even if permitted by the government — surely must be burdened by military secrets, classified information (as was the case in *Trevino*), non-cooperation, lost evidence, stale leads, incomplete memories, and even death or disability of key witnesses. Such a litigation milieu hardly augurs well for advancing the search for the truth, let alone the policies behind "uniquely federal interests." In short, *Trevino* invites litigation and inquiry into essentially nonjusticiable aspects of military thought processes.

Still another example of *Trevino's* internal inconsistencies is the court's analysis of the Navy's knowledge about the alleged defect. *Trevino* says:

> "The defective aspects of the design and the dangers of the vacuum were so obvious that *the Navy must be charged with knowledge of the defect*; yet the Navy built the

> diving hangar as designed and operated it for thirteen years." 865 F.2d at 1487 n. 13. [emphasis supplied]

Further, the court says, "both the Navy and General Dynamics knew or should have known of the dangers . . ." and "knew that the system as designed could create a partial vacuum." *Ibid.* Moreover, "both the Navy and General Dynamics could see that the final design included no safety devices." *Ibid.*; see also *Id.* at 1488-1489.

These "findings" that the Navy *knew* the dangers and *knew* of the absence of safety devices are dramatically inconsistent with the court's earlier conclusion that the Navy did not exercise its "discretion" in "approving" the contractor's work. Obviously, if the government is held either to have known the dangers or failed to act upon what it "should have known," then any Naval design review and "approval" perforce included considerations or judgments that alternative designs were unnecessary. Such decisionmaking is, by its terms, "discretionary." On the contrary, if the dangers of the vacuum "were so obvious that the Navy must be charged with knowledge of the defect" [865 F.2d at 1487 n. 13], the Navy's "approval" here cannot have been the mere "rubber stamp" the court repeatedly discusses in hypothetical "straw man" terms. See *Id.* at 1479, 1480, 1481 n. 7, 1482, 1486, 1487 n. 12. One may question the wisdom of that "approval" by hindsight but that does not contraindicate the exercise of government "discretion."

Indeed, the *Trevino* panel seems to say so directly when discussing the findings of negligence by the Navy. There the court restates the conclusion that "the Navy knew" the design dangers [865 F.2d at 1488] and even that the Navy "*chose* to use the GRAYBACK as designed and *dealt* with the possibility of a vacuum *by training its employees* rather than by modifying the submarine." *Id.* at 1488-1489 [emphasis supplied]. This "*method of dealing with the dangers in the design* were effective for thirteen years." *Id.* at 1489 [emphasis supplied].

If the Navy *knew* or should have known the dangers and *chose* to use the design by *dealing* with the problem through the training of personnel instead, it is obvious that some element of conscious design discretion *was,* in fact, exercised. The "approval" of a design throughout planning, construction and actual use for over 13 years could not have been a "rubber stamp." The *Trevino* findings are internally inconsistent[2] and should be reviewed.

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2. The Fifth Circuit panel seems to grapple with this inconsistency by labeling the Navy's conduct a "rubber stamp" and by calling this a case of "*failure* to exercise discretion over the design." 865 F.2d at 1487 n. 13 [emphasis in original]. However, this is mere semantic distortion. If one "knew" about a design danger because it was "obvious" and "chose" to "approve" the design nonetheless and also "chose" to "deal with the problem" by training users instead, the discretionary element of "choice" is not thereby eliminated by calling it a "failure" to exercise "discretion." A decision *not* to change a *known* danger or to accept *known* and obvious risks by dealing with them in another manner is as much a "discretionary" decision as one in favor of changing the design.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL HOENIG*
AARON D. TWERSKI
DANIEL V. GSOVSKI
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500
Attorneys for
The Product Liability
Advisory Council, Inc.

October, 1989

*Counsel of Record

APPENDIX

Member Companies of *Amicus Curiae*
Product Liability Advisory Council, Inc.
("PLAC")

American Home Products Corporation
American Telephone & Telegraph
Amoco Corporation
Anheuser-Busch Companies, Inc.
Automobile Importers of America
The Budd Company
Caterpillar, Inc.
Chrysler Corporation
Clark Material Handling Company
The Coleman Company, Inc.
Dana Corporation
Defense Research Institute
Dow Chemical Company
Eaton Corporation
Exxon Corporation
Federal-Mogul Corporation
Fiat Auto U.S.A. and Ferrari, N.A.
Firestone Tire & Rubber Company
FMC Corporation
Ford Motor Company
Fruehauf Corporation
General Electric Company
General Motors Corporation
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc.
Harnischfeger Industries
Honda North America, Inc.
Hyundai Motor America
Johnson Controls, Inc.

Kawasaki Motors Corp., USA
Eli Lilly and Company
Merck & Co., Inc.
Miller Brewing Company
Mitsubishi Motor Sales of America
Monsanto Company
Motor Vehicle Manufacturers Association of the United States, Inc.
Navistar International Transportation Corp.
Nissan Motor Corporation, USA
Otis Elevator Company
Paccar, Inc.
Piper Aircraft Corporation
Playtex Family Products Corp.
Porsche Cars North America, Inc.
Procter & Gamble Company
RJR Nabisco, Inc.
Rockwell International
Saab-Scania of America, Inc.
Snap-On Tools Corporation
Squibb Corporation
Sturm, Ruger and Company
Subaru of America, Inc.
TRW, Inc.
Toyota Motor Sales, U.S.A., Ltd.
U-Haul International
Union Carbide Corporation
Unocal Corporation
U.S. Tobacco
USX Corporation
Volkswagen of America, Inc.
Volvo North America Corporation
Jervis B. Webb Company
Yamaha Motor Corporation, U.S.A.

No. 89-376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

ROBIN S. CONRAD
Counsel of Record
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae Chamber of Commerce of the United States

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

With the written consent of the parties,[1] the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the Petitioner, General Dynamics Corporation. The Chamber is the nation's largest federation of business organizations and individuals. Its membership includes over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce.

Many Chamber members, both large and small businesses, are involved in the defense industry and partici-

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[1] Letters of consent are on file with the Clerk of the Court.

pate in the design and manufacture of military equipment for use by and under contracts with the United States government. The Chamber regularly represents the interests of these government contractor members on issues of national concern before Congress,[2] the Executive branch [3] and the courts.[4] Most recently, the Chamber filed an *amicus* brief before this Court on their behalf in *Boyle* v. *United Technologies Corp.*, —— U.S. ——, 108 S. Ct. 2510 (1988), a landmark case which provided government contractors with much needed protection from state tort liability for design defects in military equipment. In *Boyle*, this Court recognized a government contractor defense as a matter of federal common law and set forth a three-part test for determining the scope of contractor immunity. Under this test, a government

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[2] *See e.g.*, Comments of the Chamber of Commerce of the United States on H.R. 2579, the "Defense Contractor Whistleblower Act of 1989," submitted to the House Committee on Armed Services (July 10, 1989); Statement of the Chamber of Commerce of the United States on H.R. 3911, the "Major Fraud Act of 1988," submitted to the Senate Committee on the Judiciary (July 12, 1988); and Statement of the Chamber of Commerce of the United States on the "Reauthorization of the Office of Federal Procurement Policy," submitted to the Subcommittee on Federal Spending, Budget and Accounting of the Senate Committee on Governmental Affairs (March 25, 1988).

[3] *See e.g.*, Comments of the Chamber of Commerce of the United States on General Services Administration Proposed Rule on "Procurement Integrity," Federal Acquisition Regulation (FAR) Case 89-23 (April 26, 1989) and Comments of the Chamber of Commerce of the United States on General Services Administration Interim Rule on the "Drug-Free Workplace Act of 1988 (April 5, 1988)

[4] The Chamber has filed *amicus* briefs on behalf of its government contractor members in a number of important cases at the lower court level. *See e.g.*, *U.S.* v. *Westinghouse Electric Corp.*, 615 F. Supp. 1163 (D.C. Pa. 1985) *aff'd*, 788 F.2d 164 (3d Cir. 1986); *U.S.* v. *Newport News Shipbuilding and Dry Dock Co.*, 837 F.2d 162 (4th Cir. 1988) ("Newport News I"); and *U.S.* v. *Newport News Shipbuilding and Dry Dock Co.*, 655 F. Supp. 1408 (E.D.Va. 1987) ("Newport News II").

contractor must prove (1) that the government approved reasonably precise specifications; (2) that the equipment conformed with those specifications and (3) that the contractor warned the government about the dangers in using the equipment known to it but not to the government.

As *amicus curiae* in *Boyle*, the Chamber urged the Court to adopt a simple test for contractor immunity similar to the one articulated in *Yearsley* v. *W. A. Ross Construction Co.*, 309 U.S. 18 (1940), the only Supreme Court precedent on the subject of a government contractor defense.[5] Under a *Yearsley* approach, a military contractor would not be liable in tort for injuries resulting from a "uniquely military" product that was put to "military use."

The Chamber argued in its *amicus* brief that a *Yearsley*-type defense—which would focus only on the nature of the product and its use—would substantially minimize judicial scrutiny into military decisionmaking and add certainty to the scope of contractor immunity from tort liability. The Chamber also predicted that a simple *Yearsley*-type defense would prevent courts from becoming mired in questions of how to construe each element of a more complicated government contractor defense.

As the first post-*Boyle* decision to reach this Court, *Trevino* v. *General Dynamics Corp.*, 865 F. 2d 1474, *reh'g denied*, 876 F.2d 1154 (5th Cir. 1989), is a classic example of the judicial interpretation problems that can result from complicated multi-part tests. By holding that government "approval" under the first prong of the

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[5] The *Yearsley* Court held a public works contractor immune from liability essentially because it was carrying out the will of the government. 309 U.S. 20-21.

Boyle test must be equivalent to the exercise of a discretionary function under the Federal Tort Claims Act,[6] the Fifth Circuit has added a complex layer of analysis to the governmental contractor defense never intended by this Court.

Rather than eliminating the uncertainty surrounding the application of the government contractor defense, as was *Boyle*'s intent, the Fifth Circuit grafted a confusing body of case law onto the first prong of the *Boyle* test which renders the test completely unworkable. In so doing, the *Trevino* court has seriously undermined this Court's decision in *Boyle* and significantly eroded the government contractor defense.

On behalf of the American business community, the Chamber urges this Court to correct the Fifth Circuit's error and prevent further erosion [7] of *Boyle* and the protection it affords government contractors. For these and the reasons stated below, the Chamber respectfully re-

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[6] The FTCA is an express waiver of sovereign immunity which allows the federal government to be sued for monetary damages for harm caused by negligent or wrongful conduct of federal employees. 28 U.S.C. § 1346(b), 2671-2680. Under the discretionary function exception, however, the FTCA retains sovereign immunity for any claim "based on the exercise or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). What constitutes a "discretionary function" is the subject of much confusion and a continually growing body of caselaw. *See generally, United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* 467 U.S. 797 (1984).

[7] *See, In Re New York City Asbestos Litigation,* Index No. 17516-87 *et al.*, 1989 N.Y. Misc. Lexis 315, 5 (N.Y. Sup. Ct. May 9, 1989)

> ("In order to satisfy the first element of the *Boyle* test, not only must there be governmental approval of design of the product, but such approval must be a discretionary function of the government.")

quests this Court to grant General Dynamics' *Petition for a Writ of Certiorari* in this case and reconsider a *Yearsley*-type approach for determining what constitutes government "approval" of design specifications under the *Boyle* defense.

STATEMENT OF THE CASE

This case arises out of an accident in which five Navy scuba divers died from vacuum-induced bends in the diving chamber of a Navy submarine. The cause of death was attributed to the failure of the ventilation valve of the diving chamber to be fully opened, which prevented air from entering the chamber while releasing water from it. The accident occurred on January 16, 1982, approximately twenty years after the Navy established the basic design concept for converting the submarine into a personnel-carrier capable of dispatching divers underwater.[8] Not only did the Navy develop the design details for the diving chamber, but it also built, tested and installed the chamber in the submarine at a naval shipyard of its choice.

The Navy had contracted with the General Dynamics Corporation ("General Dynamics") in 1966 and 1967 to produce working drawings of the diving hangar and its "lock in/lock out" system, which allowed divers to exit and re-enter the submarine through a flooded diving chamber. General Dynamics completed its contract in 1968, having produced 31 working drawings for the Navy. Each of those drawings was reviewed and "approved" by Navy personnel on separate, individual signature blocks. The Navy exclusively performed and com-

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[8] The Navy set forth its design concept for the diving chamber in a 339-page circular of requirements, called a "COR". Included in the "COR" was a two-page description of the diving hangar design and a one-page diagram of the chamber's flood and drain system (otherwise known as the "lock in/lock out system").

pleted all manufacturing and conversion work on the submarine, including the construction and installation of the diving chamber, during the following year.

Between 1969 and 1982, when the accident occurred, the Navy used the diving chamber[9] as designed without alteration, despite its actual knowledge that the ventilation valve was difficult to open and its control handle was difficult to see.[10] Notwithstanding such notice, the Navy chose not to conduct a formal design/safety review of the diving system until after the accident occurred.

The families of the divers sued the Navy and General Dynamics in the U.S. District Court for the Eastern District of Texas for strict liability, negligence and breach of warranty. *Trevino* v. *General Dynamics Corp.*, 626 F. Supp. 1330 (E.D. Tex. 1986). The Navy claimed immunity from suit under the *Feres/Stencel* doctrine.[11] General Dynamics raised the government contractor defense.

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[9] According to the Petition for a Writ of Certiorari, the Navy used the diving chamber 555 times during those years. *See Pet. Cert.* at 3.

[10] The Navy had been informed by its own personnel "on at least four occasions that the ventilation valve control was difficult to turn." *Trevino* v. *General Dynamics Corp.*, 856 F.2d 1474, 1477 (5th Cir. 1989).

[11] The *Feres/Stencel* doctrine of government immunity from tort liability derives from two Supreme Court cases. In *Feres* v. *United States*, 340 U.S. 135, 146 (1950), the Court held that the "[g]overnment is not liable under the Federal Torts Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." In *Stencel Aero Engineering Corporation* v. *United States*, 431 U.S. 666 (1977), the Court broadened the scope of government immunity by barring contractors from seeking indemnity from the government for damages arising out of service-related injuries to members of the armed forces.

The district court found that the Navy and General Dynamics were both negligent. It apportioned 80% of the liability to General Dynamics for the design of the diving chamber and 20% to the Navy for failure to maintain the chamber and adequately train the divers in how to deal with the possibility of vacuum formation. Nevertheless, the court upheld the Navy's defense, but refused to grant General Dynamics' claim for immunity under a pre-*Boyle* version of the government contractor defense.[12] The district court held that General Dynamics could not avail itself of the defense because it, and not the Navy, had performed the design work in question.

The U.S. Court of Appeals for the Fifth Circuit affirmed. Focusing exclusively on the first prong of the government contracts defense established by this Court in *Boyle* v. *United Technologies Corporation*, —— U.S. ——, 108 S. Ct. 2510 (1988),[13] the Fifth Circuit held that government "approval under the defense must constitute a discretionary function" within the meaning of the Federal Tort Claims Act, 28 U.S.C. § 2680 (a). *Trevino*, 865 F.2d at 1480. Accordingly, the Fifth Circuit found that General Dynamics did not meet the first prong of the *Boyle* test because the Navy did not conduct a "substantive review and evaluation of the contractor's design choices." *Id.* at 1486.

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[12] *Bynum* v. *FMC Corp.*, 770 F.2d 556 (5th Cir. 1985). In *Bynum*, the prevailing case in the Fifth Circuit at the time, the "reasonably precise specifications" were established by the government, and not the contractor; thus, the Court never reached the question of what constitutes approval.

[13] The Fifth Circuit issued its opinion less than one year after this Court decided *Boyle*.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's wholesale importation of the discretionary function doctrine into the "approval" element of the government contractor defense completely distorts this Court's discussion of that exception to the Federal Tort Claims Act ("FTCA") in *Boyle*. This Court relied on the discretionary function exception as a philosophical predicate for recognizing a government contractor defense under federal common law. It did not intend for the doctrine to be incorporated as an element of the *Boyle* defense itself.

By equating government "approval" with the exercise of a discretionary function under the FTCA, the Fifth Circuit has grafted onto the first prong of the government contractor defense a confusing body of case law that intricately involves the judiciary in military decisionmaking. The degree of scrutiny required by the Fifth Circuit to determine whether the government performed a "substantive review and evaluation" [14] which "involve[d] the use of policy judgment" [15] will invariably result in the same kind of judicial scrutiny of military decisions this Court tried to avoid by establishing a government contractor defense under federal common law in *Boyle*.

The unnecessary complexity of the Fifth Circuit's interpretation of the first prong of the *Boyle* test could itself have been avoided had this Court adopted a *Yearsley*-type government contractor defense in the first place. Determining whether a product is military or commercial is a relatively simple process requiring no intrusion by the courts into military decisionmaking. Evidence that a product was put to a military use can be proved in several ways, none of which require the judiciary to second-guess procurement decisions.

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[14] *Trevino*, 865 F.2d at 1480.

[15] *Id.*

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Erred In Making Government Approval Equivalent To Exercising A "Discretionary Function."

In *Trevino* v. *General Dynamics Corp.*, the Fifth Circuit refused to grant the Petitioner the protection of the government contractor defense because it did not satisfy the "approval" element of the *Boyle test.* 865 F.2d 1474, 1479 (1989). According to *Trevino*, "approval under the defense must constitute a discretionary function" within the meaning of the Federal Tort Claims Act. *Id.* at 1480. The *Trevino* court defined discretionary functions as government acts "that involve the use of policy judgment" requiring "substantive review or evaluation." *Id.* It further required that the government exercise its discretion "over significant details and all critical design choices." *Id.* at 1481.

The Fifth Circuit based its interpretation of government "approval" on this Court's discussion of the discretionary function doctrine in *Boyle* v. *United Technologies Corp.*, —— U.S. ——, 108 S. Ct. 2510 (1988). In so doing, the Fifth Circuit has completely distorted the role of the doctrine in the *Boyle* Court's analysis of the government contractor defense as a matter of federal common law. This Court should grant General Dynamics' *Petition for a Writ of Certiorari* to correct the Fifth Circuit's error.

A. *Trevino* Distorts This Court's Use Of The "Discretionary Function Doctrine" In *Boyle.*

In *Boyle*, this Court established a three-part test under federal common law for determining contractor immunity from state tort actions arising out of design defects in military equipment. Under this test, a government contractor would not be liable for design defects under state tort law if it could prove that (1) the government approved reasonably precise specifications; (2) the equip-

ment conformed to those specifications; and (3) the contractor warned the government about the dangers known to the contractor, but not the government.

As a prerequisite for federal common law displacement of state law, the Court noted that there must be a "significant conflict between the state law and a federal policy or interest." *Boyle*, 108 S. Ct. at 2516. The Court identified "the procurement of equipment by the United States" [16] as providing a " 'uniquely federal' interest" [17] and selected the discretionary function exception of the Federal Tort Claims Act ("FTCA") [18] as the basis for the "significant conflict." [19] Under an express waiver of sovereign immunity, the FTCA allows the federal government to be sued for monetary damages for harm caused by the negligent or wrongful conduct of federal employees. The discretionary function exception, however, retains sovereign immunity for any claim "based on the exercise or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

By predicating the government contractor defense on the discretionary function doctrine, this Court significantly altered the approach previously taken in applying the government contractor defense. Scadron, *The New Government Contractor Defense: Will It Insulate Asbestos Manufacturers From Liability For The Harm Caused By Their Insulation Products?*, 25 Idaho L. Rev. 375, 377 (1988-89). Prior to *Boyle*, the majority of federal courts

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[16] *Id.* at 2515.

[17] *Id.* at 2514.

[18] 28 U.S.C. § 1346(b), 2671-2680.

[19] *Id.* at 2517.

pointed to the *Feres-Stencel* doctrine,[20] which immunizes the government from tort liability arising out of injuries to service personnel, as the predicate of the defense. The *Boyle* Court rejected *Feres-Stencel* as the source of the " 'significant conflict between federal interests and state law' "[21] because the doctrine produced results that were simultaneously "too broad" and "too narrow" when applied to government contractor liability. *Id.* The Court viewed *Feres-Stencel* as "too narrow" a basis for justifying federal displacement of state law because the doctrine covers only service-related injuries and could not be invoked to prevent a civilian's suit against a military contractor. *Id.* At the same time, the Court also found the *Feres-Stencel* doctrine to be "too broad" a basis for displacement because it would deny recovery for injuries caused by standard equipment purchased by the government from stock. *Id.*

This Court's choice of discretionary function over *Feres-Stencel* as the predicate for the government contractor defense also significantly broadened the application of the defense. As stated above, *Boyle* relied on the discretionary function exception as a philosophical predicate for recognizing a government contractor defense under federal common law. Nothing in the *Boyle* opinion remotely suggests that the doctrine itself should be incorporated as part of the *Boyle* test. The Court's statement that the first two elements of the *Boyle* defense "assure that the suit is *within the area* where the *policy* of the 'discretionary function' would be frustrated,[22]

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[20] In *Feres* v. *U.S.*, 340 U.S. 135 (1950), the Supreme Court found that a member of the armed forces did not have a cause of action under the FTCA for service-related injuries. In *Stencel Aero Engineering Corporation* v. *U.S.*, 431 U.S. 666 (1977), the Supreme Court held that a contractor had no right to indemnification against the government when it was found liable to a service member.

[21] *Boyle*, 108 S. Ct. at 2517.

[22] *Id.* (emphasis added).

serves only to support its recognition of the discretionary function doctrine as the proper policy basis for federal displacement of state law. The Fifth's Circuit's wholesale importation of the discretionary function doctrine engrafts on the *Boyle* test a requirement that totally distorts this Court's displacement analysis. For this reason alone, the Court should grant the *Petition for a Writ of Certiorari.*

B. Government "Approval" Under *Trevino* Will Result In The Same Kind Of Excessive Judicial Scrutiny This Court Sought To Avoid In *Boyle.*

The purpose of the discretionary function exception is to allow members of the executive branch to carry out policy decisions without unwarranted judicial interference. Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability,* 47 Ohio St. L. J. 985, 989 (1986). This Court recognized that purpose when choosing the discretionary function exemption as the "limiting principle" for determining the scope of federal displacement of state tort law in *Boyle.* Specifically, the Court noted:

> We think that the selection of the appropriate design for military equipment to used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely balancing engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting 'second-guessing' of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.

Boyle, 108 S. Ct. at 2517-8 (citations omitted). By making government "approval" equivalent to exercising a discretionary function under the FTCA, the *Trevino* court

has undermined this Court's effort to limit judicial interference in the military procurement proces. The degree of scrutiny required by the Fifth Circuit of a trier of fact to "locate the actual exercise of the discretionary function" [23] and determine whether it "involve[s] the use of policy judgment," [24] will invariably result in the same kind of excessive judicial investigation and evaluation of military decisions this Court tried to avoid in *Boyle*.

The confusing status of discretionary function case law [25] only exacerbates this concern. Due in part to infrequent Supreme Court review,[26] the lower courts have

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[23] *Trevino*, 865 F.2d at 1480.

[24] *Id.*

[25] In *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 811 (1984), the Court acknowledged that the discretionary function exception "admittedly has not followed a straight line."

[26] This Court has reviewed only three discretionary function cases since 1953, and in each has broadly defined the scope of government activity that falls within the discretionary function exception to the FTCA. *See Dalehite* v. *United States*, 346 U.S. 15, 35-36 (1953) ("determinations made by executives or administrators in establishing plans, specifications or schedules of operations fall within the discretionary function exception . . . . Where there is room for policy judgment and decision there is discretion."); *Varig Airlines*, 467 U.S. 797, 813 (1984) ("it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case . . . . Thus, the basic inquiry concerning the application of the discretionary functon exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."); *Berkovitz* v. *United States*, —— U.S. ——, 56 U.S.L.W. 4549, 4551 (U.S. June 14, 1988) ("The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.").

continued to develop vague [27] and inconsistent tests [28] for determining what constitutes a discretionary function under the FTCA. This Court should grant the *Petition for a Writ of Certiorari* to prevent the *Trevino* decision from subjecting the "approval" element of the government contractor defense to the same kind of confusion.

II. A Simple *Yearsley*-type Test For Government "Approval" Would Minimize Judicial Scrutiny Of Military Decisions And Add Certainty to the Government Contractor Defense.

The implications of the *Trevino* court's requirement that government "approval" of design specifications "must constitute a discretionary function," [29] are disturbing as a matter of policy as well as practice. Not only does the Fifth Circuit subvert this Court's efforts to protect military decisionmaking from undue judicial scrutiny, but it also substantially eliminates the certainty *Boyle* provided to the scope of contractor immunity from state tort liability.

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[27] *See Allen v. United States*, 816 F.2d 1417, 1420 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988) ("The key term, 'discretionary function,' is not defined. For over thirty-five years the federal courts have been attempting to define it." *Accord Dube* v. *Pittsburgh-Corning*, Civil No. 83-0224 P, 1988 U.S. Dist. Lexis 5739 (D. Me. June 9, 1988) ("Indeed, having reviewed scores of cases—and the multitude of cases litigated on the topic is itself a demonstration of the inadequacy of prior pronouncement—I conclude that no principled distinction has yet been articulated."); *Blessing* v. *United States*, 447 F. Supp. 1160, 1167 (E.D. Pa. 1978) ("Rather than a seamless web, however, we found the law in this area to be a patchwork quilt.").

[28] *Compare e.g.*, "susceptible of discretion" analysis applied in *Dube* v. *Pittsburgh-Corning*, 870 F.2d 790 (1st Cir. 1989), *petition for reh'g denied* (May 23, 1989) *with* "traditionally governmental" activity analysis applied in *Smith* v. *Johns-Manville Corp.*, 795 F.2d 301 (3rd Cir. 1986).

[29] *Trevino*, 865 F.2d at 1480.

As a practical matter, unless reversed, *Trevino* will undermine contractor confidence in the *Boyle* defense. This, in turn, may discourage government contractors from competing for essential military projects. At the very least, *Trevino* will encourage unnecessary increases in procurement and insurance costs. From a public policy standpoint, the Fifth Circuit's decision underscores the ineffectiveness of complex tests for determining contractor liability. A less complex test for determining government "approval," like the *Yearsley* test discussed below, would substantially minimize judicial inquiry into military decisionmaking and add certainty to the scope of the government contractor defense.

A. Determining The Nature And Use To Which A Product Is Put Requires No Judicial Intrusion Into Military Decisionmaking.

The unnecessary complexity of the Fifth Circuit's definition of what constitutes government "approval" under *Boyle* could have been avoided had this Court adopted a simple test for government contractor immunity similar to the one applied in *Yearsley* v. *W. A. Ross Construction Co.*, 309 U.S. 18 (1940). In *Yearsley*, the Court ruled that a contractor was not liable for damages caused when the construction work it performed for the government on the Missouri River eroded part of the petitioner's land. The *Yearsley* Court held that if the authority to carry out the project is within the constitutional power of Congress, "there is no liability on the part of the contractor for executing its will." *Yearsley*, 309 U.S. at 20-21.

The Chamber proposed the adoption of a "Yearsley-type" defense as *amicus curiae* in *Boyle*. While the *Boyle* Court did cite *Yearsley* as being the closest it had ever come to accepting the government contractor defense as a matter of federal common law,[30] it chose instead to adopt a three-part version of the government contractor

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[30] *Boyle* at 2514.

defense applied by the Ninth Circuit in *McKay* v. *Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 462 U.S. 1043 (1984). As *amicus curiae* here, the Chamber re-emphasizes the merits of a *Yearsley* approach to government contractor liability and urges the Court to consider a *Yearsley*-type analysis for determining governmental "approval" under the first prong of the *Boyle* test.

Grounded in the notion that a government contractor ought to be protected from liability if it is performing at the behest of the government, a *Yearsley*-type "approval" test would prevent courts from engaging in the degree of unbounded scrutiny of government participation in military product design required under *Trevino*. Under a *Yearsley*-type "approval" test, the judiciary need only determine (1) the nature of the product and (2) the use to which it was put. Absent fraud by the contractor in the procurement process, the contractor would be protected from tort liability for "uniquely military" products that were put to "military use." "Uniquely military" products include those products that were specially designed and produced for the military as well as commercial products that were put to military purposes or materially altered for military use. Commercial products supplied to the military, as is, and used for a purpose not uniquely military would fail a *Yearsley*-type "approval" test. Hence, determining whether a product is military or commercial is comparatively simple and requires no intrusion by the courts into military decision-making.

Similarly, evidence that a product was put to a "military use" can be proved in several ways, none of which require the judiciary to second-guess government procurement decisions. The contractor can meet its burden of proof simply through (1) government testimony in court that the goods were acceptable; (2) government affidavit attesting the product's use; or (3) *evidence, as*

in the case at bar, that the goods were placed in service and successfully used for their intended services. Proof of any one of these would demonstrate that the government received the product it desired and found it acceptable. This type of evidentiary test renders unnecessary the kind of judicial second-guesing required by *Trevino* as to whether the government conducted a "substantive review and evaluation [31] and exercised its discretion "over significant details and all critical design choices." *Id.* at 1481.

B. A *Yearsley*-type Test Advances The Separation Of Powers Principles Which Are At The Heart Of The *Boyle* Defense.

Judicial and civilian scrutiny of the "[d]ifficult choices, tradeoff, and compromises inhere[nt] in military planning that simply find no analogue in civilian life," [32] violate the separation of powers principles from which both the *Boyle* defense and the discretionary function exception evolved. As discussed above, this Court intended the *Boyle* defense to safeguard the notion that the judiciary refrain from second-guessing military decisionmaking:

> [t]he selection of the appropriate design for military equipment . . . involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including, specifically the trade-off between greater safety and greater combat effectiveness. 108 S. Ct. at 2717.

The government "approval" test imposed by *Trevino* undermines the very policy *Boyle* hoped to enforce. A *Yearsley*-type test for determining government "approval" would preserve the purpose of these principles by precluding suits by servicemen and civilians against the contractor who is doing work for the government.

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[31] *Trevino*, 865 F.2d at 1480.

[32] *Tozer* v. *LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986).

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully urges this Court to grant the *Petition for a Writ of Certiorari.*

Respectfully submitted,

ROBIN S. CONRAD
Counsel of Record
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae Chamber of Commerce of the United States

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